Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ROBERT T. KAPTURE, WARDEN,

Petitioner,

v.

DARRIN T. HATCHETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a defendant need not demonstrate actual prejudice where his counsel's error resulted in the loss of an appeal from his conviction because there would be no way for a reviewing court to determine if the defendant had been prejudiced. Here, Respondent's counsel failed to take an interlocutory appeal from the juvenile waiver hearing that found that Respondent should be tried as an adult, but the waiver hearing and trial court's decision were available for review to enable a reviewing court to determine whether he was prejudiced.

Should the presumed prejudice standard under *Roe* be expanded to these circumstances?

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OPINIONS BELOW

The decision of the Michigan Court of Appeals affirming Respondent's conviction on direct appeal was filed on March 10, 1989, but was not published. *People v. Hatchett*, No. 104510 (Mich. Ct. App. March 10, 1989), App. 26a. Respondent sought leave to appeal this decision in the Michigan Supreme Court. On November 29, 1989, the Michigan Supreme Court denied leave to appeal. *People v. Hatchett*, No. 85743, 433 Mich. 909 (1989), App. 29a.

Respondent raised the claim which forms the basis of this appeal for the first time in a state collateral proceeding. The Michigan Court of Appeals rejected that appeal in an unpublished order. *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999), App. 30a. The Michigan Supreme Court likewise denied relief by unpublished order. *People v. Hatchett*, No. 114355 (Mich. Sup. Ct. Sept. 29, 1999), App. 31a.

Respondent filed for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, which on March 6, 2003, denied Respondent habeas relief, in part, for failure to demonstrate he was actually prejudiced by his attorney's failure to appeal the juvenile waiver order. *Hatchett v. Kapture*, Eastern District of Michigan No. 00-cv-74340, App. 8a. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On August 19, 2004, the Court of Appeals entered its opinion reversing the decision of the district court, finding Respondent was not required to demonstrate actual prejudice. *Hatchett v. Kapture*, 109 Fed. Appx. 34 (6th Cir. 2004), App. 2a. The Court of Appeals denied the State's petition for rehearing *en banc* by order dated November 22, 2004, App. 1a.

JURISDICTION

The Court of Appeals opinion reversing the district court's denial of habeas relief was entered on August 19, 2004, App. 2a. Respondent's Petition for Rehearing *en banc* was denied on November 22, 2004, App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The constitutional and statutory provisions involved in this petition are as follows:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 1986, while he was a juvenile, Darrin Hatchett shot and killed a classmate, Rodney McRae. The facts adduced at his jury trial were largely undisputed. Respondent and the victim had a few fights at school. During the evening of December 29, 1986, Respondent was at Michael Howard's house playing pool. Several other youths were also present. At some point McRae arrived. McRae asked Respondent if he was still mad at him. Respondent told him to "shut-up" and left the house.

A few minutes later Respondent returned, produced a revolver, pointed it in McRae's direction, and declared: "Talk your junk now, punk."

From across the pool table, Respondent shot McRae two times in the chest and side, and McRae fell to the floor. Respondent then walked over to where McRae fell and shot him two more times in the head. Afterwards, several of the people present helped clean up the blood and dispose of the body in a dumpster. Three of the youths present, all friends with both Respondent and the victim, testified to this account. (Eric Minor, Tr., pp. 8-13, App. 32a; Michael Howard, Tr., pp. 34-38, App. 41a; Lloyd Whitfield, Tr., pp. 59-62, App. 48a).

Respondent testified in his own defense, claiming a hybrid accident/self-defense theory: "When I got in the basement, I went to the other side of the room, and me and Rodney were arguing a little more, and I pulled the gun and said, talk your junk. I aimed the gun like that and said that and I fired it, and I didn't know if he grabbed – it looked like he went for something and I shot some more." (Tr., p. 79, App. 54a). Respondent explained that he was aiming so that he would fire over the victim's shoulder, but the bullet hit him. (Tr., p. 80, App. 55a). At the same time he saw the victim grab toward his side, so Respondent shot him some more, including in the head. (Tr., pp. 80-81, App. 55a).

Because Respondent was a juvenile when this occurred, under Michigan law in effect at the time the prosecutor was required to commence proceedings against him in the probate court. A probable cause hearing was held on January 20, 1987. Respondent does not contest anything that transpired during this hearing, and at its conclusion probable cause was found to believe that a crime was committed and that Respondent perpetrated it.

On March 10, 1987, a waiver hearing was held after which Respondent was waived over to the circuit court for trial as an adult. Respondent does not allege that any error occurred in the waiver hearing either.

The late Charles Campbell was then appointed to represent Respondent. He did not appeal from the waiver of juvenile court jurisdiction to the trial court, despite Respondent's present claim that he was requested to do so. It is this inaction that forms the basis of the Sixth Circuit's decision that Respondent was denied the effective assistance of counsel.

At trial, Respondent was represented by new counsel, and after the evidence summarized above was presented, the trial court found Respondent guilty of second-degree murder and felony-firearm, and Respondent was sentenced to life imprisonment.

Respondent was appointed appellate counsel to handle his appeal. His appellate attorney filed an appeal of right and raised two issues in the appellate brief: 1) that there was insufficient evidence to sustain the conviction, and 2) that the life sentence was excessive.

The Michigan Court of Appeals affirmed Respondent's conviction and sentence in an unpublished opinion. *People v. Hatchett*, No. 104510 (Mich. Ct. App. March 10, 1989), App. 26a. Subsequently, the Michigan Supreme Court denied leave to appeal by standard order. *People v. Hatch*ett, No. 85743 (Mich. Sup. Ct. Nov. 29, 1989), App. 29a.

Thereafter Respondent unsuccessfully pursued collateral review in the state courts, where he raised among other claims, his argument that attorney Campbell was ineffective for failing to appeal the waiver from juvenile court. *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999), App. 30a; *People v.*

Hatchett, No. 114355 (Mich. Sup. Ct. Sept. 29, 1999), App. 31a.

Respondent then filed for Federal habeas relief under 28 U.S.C. § 2254. The district court denied the writ on the merits. With respect to the instant issue, the court found that Respondent had not demonstrated that he was actually prejudiced by the failure of his counsel to appeal the juvenile waiver:

> Given the probate court's reasoned opinion, as well as the nature of the crime and the recommendation of an expert witness that Petitioner be tried as an adult, it is unlikely that Petitioner would have prevailed if Charles Campbell had appealed the probate court's decision to waive jurisdiction. Petitioner has not demonstrated a reasonable probability that, but for Campbell's failure to appeal the probate court's decision, the result of the proceeding would have been different. [*Hatchett v. Kapture*, USDC 00-CV-74340-DT, Opinion dated March 6, 2003].

Respondent appealed this decision to the United States Court of Appeals for the Sixth Circuit, arguing in part, that he was not required to demonstrate that the result of the proceedings would have been different had his attorney appealed the juvenile waiver in light of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The State argued, among other things, that *Roe* did not apply because this case involved the failure to take an appeal from an interlocutory order, as opposed to the failure to take an appeal from the conviction itself. This Court of Appeals reversed, finding that *Roe* applied to such claims:

> Hatchett argues that to prove his ineffective assistance of counsel claim under the Sixth Amendment, he need not show the merit of his appeal, but must show (1) that counsel's representation fell

below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, and (2) that counsel's deficient performance prejudiced the defendant. *Id.* at 692. We agree.

Prejudice is sufficient to satisfy the second prong of *Strickland*. Prejudice is presumed from counsel's failure to file a notice of appeal when requested by his client. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

The district court, however, concluded that Hatchett must in addition demonstrate in his 28 U.S.C. § 2254 petition that his appeal had some merit. In *Roe*, the Supreme Court held that counsel's failure to pursue an appeal requested by a defendant constitutes ineffective assistance of counsel regardless of the likelihood of success on the merits. *Id.* at 486. [*Hatchett v. Kapture*, 109 Fed. Appx. 34, 37 (6th Cir. 2004)].

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred when it held that in a claim of ineffective assistance of counsel for failure to pursue an interlocutory appeal from a juvenile waiver hearing, a criminal defendant is not required to demonstrate that his interlocutory appeal would have likely succeeded The Court of Appeals' ruling thus greatly expands the holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), where this Court found that a defendant need not demonstrate actual prejudice in cases where counsel's deficient performance resulted in the loss of an appeal of the conviction itself. The rationale of *Roe*, however, should not be extended to claims such as Respondent's. As is the case with ordinary claims of ineffective assistance of counsel, a reviewing court is able to discern whether a defendant was actually prejudiced by the loss of an interlocutory appeal. Therefore, in such cases a defendant

should be required to demonstrate actual prejudice under the general standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Still worse, the Court of Appeals expanded a rule of constitutional law on habeas review of a state conviction even though such expansions of constitutional rules are prohibited in such proceedings. *Beard v. Banks*, 124 S.Ct. 2504, 2511 (2004). This Court should grant *certiorari* in this case of first impression to determine which prejudice standard governs such claims of ineffective assistance of counsel.

I. Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a defendant need not demonstrate actual prejudice where his counsel's error resulted in the loss of an appeal from his conviction because there would be no way for a reviewing court to determine if the defendant had been prejudiced. Here, Respondent's counsel failed to take an interlocutory appeal from the juvenile waiver hearing that found that Respondent should be tried as an adult, but the waiver hearing and trial court's decision were available for review to enable a reviewing court to determine whether he was prejudiced.

The presumed prejudice standard under *Roe* should not be expanded to these circumstances.

A. Introduction.

This case raises for the first time the standard of prejudice to be applied to the loss of an appeal other than an appeal of the conviction itself due to the deficient performance of a criminal defendant's counsel.

The Court of Appeals erroneously expanded this Court's holding in *Roe* and found that to prevail on his claim of ineffective assistance of counsel for counsel's failure to pursue an interlocutory appeal, Respondent was only required to show

that he would likely have appealed the juvenile waiver order, rather than show an appeal would have likely been meritorious.

This case evidences a continuing trend by the Court of Appeals in which it has either given short shrift or abandoned the *Stickland* actual prejudice standard in reviewing state court convictions. See, e.g., *Miller v. Webb*, 385 F.3d 666, 673, 676 (6th Cir. 2004) (presuming prejudice where counsel failed to object to seating of biased juror); *Caver v. Straub*, 349 F.3d 340, 349-350 (6th Cir., 2003) (presuming prejudice where counsel was absent when jury was re-read identical portion of jury instructions); *Mitchell v. Mason*, 325 F.3d 732, 742 (6th Cir., 2003) (presuming prejudice where counsel suspended from practice of law for thirty-day period preceding trial); *Holland v. Jackson*, 124 S. Ct. 2736, 2737 (2004) (summarily reversing Sixth Circuit's treatment of the *Strickland* prejudice prong).

Respondent should have been required to demonstrate actual prejudice because Respondent's claim of ineffective assistance of counsel is no different from ordinary claims of ineffective assistance of trial counsel where it is possible to discern whether actual prejudice occurred. That is, a reviewing court may readily review the record of the juvenile waiver proceeding and determine whether an appeal would have likely been successful. Furthermore, Respondent was afforded new counsel on appeal from his conviction, who was able to review the record to determine if there was an issue of ineffective assistance of counsel that caused his client actual prejudice.

B. The requirement is that a defendant demonstrate prejudice to sustain a claim of ineffective assistance of counsel.

The general rule under the Sixth Amendment is that a defendant must show actual prejudice – he must demonstrate a reasonable probability that the result of the proceeding would

have been different - to sustain a claim of ineffective assistance of counsel under the Sixth Amendment. *Strickland*, 466 U.S. at 694. Among other things, this actual prejudice standard has been widely applied to situations where counsel failed to seek various types of hearings and proceedings prior to trial. But this Court has also carved out a limited number of exceptions to *Strickland's* general actual prejudice rule in which prejudice is presumed. See: *Bell v. Cone*, 535 U.S. 685, 695-696 (2002) (listing three categories of cases where prejudice is presumed):

> 1) the complete denial of denial of counsel at a critical stage;
>
> 2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and
>
> 3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not.

Finally, in two cases this Court applied a prejudice standard that falls somewhere between the actual prejudice standard articulated in *Strickland*, and the presumed prejudice standard described in *Bell*. First, in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), this Court found that when counsel's deficient performance resulted in the defendant pleading guilty instead of standing trial, the defendant need not show that he likely would have prevailed at a trial to demonstrate prejudice. Rather, he must show only "that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial."

Second, in *Roe* this Court found that when counsel's deficient performance resulted in the loss of a direct appeal from a conviction, to demonstrate prejudice the defendant must demonstrate merely "that there is a reasonable probability that,

but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. at 484. He need not show that he had meritorious claims on appeal, or that he likely would have prevailed on appeal.

This Court has not yet determined whether *Roe* and *Hill* should be limited to those two particular claims, or whether, and to what extent, such a modified *Strickland* standard should be applied to various other claims of ineffective assistance of counsel.

C. The prejudice standard from Roe does not apply to counsel's deficient failure to take an interlocutory appeal.

The Court of Appeals misinterpreted *Roe* as creating a rule to be applied in a broader context. It expanded the modified prejudice standard and applied it to a situation where the defendant is deprived of an interlocutory appeal by his counsel's deficient performance. This Court should grant review to foreclose this sort of expansion of *Roe* and *Hill*, and demand the Court of Appeals' compliance with *Strickland.* As indicated above, this case is the latest in a series of cases decided by the Sixth Circuit in which it has modified or abandoned the prejudice prong of *Strickland* in reviewing state court convictions. Such a modification of a constitutional rule is prohibited on habeas review. *Beard v. Banks*, 124 S.Ct. 2504, 2511 (2004).

Where, as here, counsel fails to adequately advise his client regarding the availability of appealing a juvenile waiver order, the situation is materially different from *Roe*. Here a record exists from which actual prejudice can be ascertained from that failure. Furthermore, Respondent was still afforded a direct review of his conviction in which the trial record could have been examined for other potential claims. Therefore, Respondent's ineffective assistance of counsel claim is

substantially equivalent to ordinary claims of ineffective assistance of trial counsel in which actual prejudice must be shown.

In *Roe* this Court found that a defendant who lost the appeal from his conviction need not show actual prejudice because the error led to loss of the proceeding itself. It was not merely a question of determining whether an attorney error during a proceeding rendered the proceeding unreliable. The Court reasoned that it was impossible to determine whether a proceeding's reliability was affected by counsel's mistakes when the mistake resulted in the loss of the entire proceeding. *Roe*, 528 U.S. at 483.

The *Roe* rationale does not apply to the failure to take an interlocutory appeal from a pretrial juvenile waiver hearing. Courts routinely require defendants to demonstrate actual prejudice when their counsel's deficient performance resulted in the loss of a pretrial proceeding.

For example, where an attorney unreasonably fails to move for a pretrial hearing to suppress an eyewitness identification on the ground that the procedure was unduly suggestive, it is equally impossible to determine the reliability of the pretrial hearing, because it was never held. The same is true of lost pretrial hearings challenging the voluntariness of confessions, or challenging the legality of a search and seizure. Courts routinely apply the actual prejudice standard from *Strickland* to such circumstances.

For example, in *Laboa v. Calderon*, 224 F.3d 972, 981 (9th Cir. 2000), defense counsel deprived the defendant of an opportunity to have a pretrial hearing determining the admissibility of his confession. Still the Ninth Circuit required the defendant to demonstrate actual prejudice by showing that such a pretrial challenge would have affected the outcome of his trial. See also, e.g., *Valdez v. Ward*, 219 F.3d 1222, 1244

(10th Cir. 2000); *Patterson v. United States*, 133 F.3d 645, 648 (8th Cir. 1998); and *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir., 1995).

Likewise, in *Kimmelman v. Morrison*, 477 U.S. 365, 390-391 (1986), this Court required the defendant to demonstrate that his counsel's failure to request a pretrial hearing to suppress evidence under the Fourth Amendment resulted in actual prejudice. The Court found that the defendant was required to show there was a reasonable probability that the verdict would have been different had the challenged evidence been excluded. See also, e.g., *United States v. Stewart*, 388 F.3d 1079, 1084 (7th Cir. 2004).

Finally, the actual prejudice standard has even been employed by the Fifth Circuit Court of Appeals in a case with a claim substantially similar to Respondent's. In *Foster v. Johnson*, 293 F.3d 766, 789 (5th Cir. 2002), the Fifth Circuit found that counsel rendered deficient performance for failing to file a motion to transfer a case to juvenile court, but found no actual prejudice because: "given [defendant's] age and the [psychiatric evaluation] findings, it was not reasonably probable that the outcome would have been different (i.e., that the trial court would have granted a transfer motion) if [counsel] had filed a transfer motion." See also, e.g., *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) (even if lost appeal of juvenile waiver had been successful, juvenile court would have waived jurisdiction after second waiver hearing); *State v. Jack*, 676 A.2d 545, 548-551;144 N.J. 240, 248-254 (1996).

The reason that all these claims of ineffective assistance of counsel may be resolved using the unaltered *Strickland* actual prejudice standard is because it is possible to determine the reliability of the result reached at trial and on direct appeal, despite the fact that a pretrial proceeding was altogether lost. In none of these cases was the defendant deprived of the trial itself or of plenary appellate review at the conclusion of the

trial proceedings. For example, one can look at the evidence produced at trial in each of these cases and determine whether suppressing the disputed evidence likely would have made a difference. Likewise, in each of these cases the defendant was afforded counsel on direct appeal who was able to raise claims asserting trial counsel's failures for failure to request the pretrial hearing.

Unlike the facts of *Roe*, Respondent's failure to take the interlocutory appeal to the trial court on the issue of the juvenile waiver did not "deprive[] [Respondent] of the appellate proceeding altogether." *Roe*, 528 U.S. at 483. Rather, counsel, through his deficient performance, merely foreclosed review of one issue -- whether the juvenile waiver was valid. And while Respondent's new appellate counsel may have lost the ability to directly raise the underlying issue of the propriety of the juvenile waiver under Michigan law, he was not prohibited from raising an ineffective assistance of counsel claim for failing to file the interlocutory appeal. That is, Respondent was left in the same position as a defendant in ordinary ineffective assistance of counsel cases challenging counsel's failure to request any sort of pretrial hearing. Respondent did just that during state collateral review, and his appellate counsel very well could have raised that claim on direct review.

D. The district court in this case was able to fairly determine whether Respondent was actually prejudiced by the failure of his counsel to appeal the juvenile waiver.

In this case, the district court was able to fairly determine whether Respondent could demonstrate actual prejudice. Unlike the situation in *Roe,* Respondent had no less than two state court appeals in which a record was, or could have been, developed and reviewed to determine the strength of an appeal from the juvenile waiver.

Indeed, the record shows that Respondent had no chance of being treated as a juvenile, and that any appeal from the juvenile waiver proceeding would have been futile. Under Michigan law existing at the time of Respondent's trial, M.C.L. 712A.4(4), the juvenile court was required to consider five criteria in determining whether to waive jurisdiction over a juvenile:

(a) The prior record and character of the child, his physical and mental maturity and his pattern of living.

(b) The seriousness of the offense.

(c) Whether the offence, even if less serious, is part of repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.

(d) The relative suitability of programs and facilities available to the juvenile and criminal court for the child.

(e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender.

At the waiver hearing the only witness addressing Petitioner's suitability for waiver was Thomas Regan, a psychologist with the Wayne County Clinic for Child Study. Regan testified that Respondent suffered from a lot of inner hostility and that his thinking was quite confused. T 3/10/87, p. 67, App. 59a. Regan opined that he was the type of person who once stimulated, becomes very intense and has difficulty backing off. *Id.*, p. 68, App. 60a. Respondent has disregard for rules and authority, he is egocentric, impulsive, and self-indulgent. *Id.*, p 68, App. 60a. Regan felt that Respondent

required long term incarceration because of the morbidity of his pathology and his instability. *Id.*, p 71, App. 62a. He viewed Respondent as being very unstable, very disturbed, and strongly delinquent. *Id.*, p 72, App.63a. Regan thought Respondent was going to have emotional difficulties most of his life, and that he would only be able to make marginal adjustments. *Id.*, p 81, App. 65a. Regan did not believe that there was enough time left in the juvenile system for Respondent to improve to the point where he could begin to function without hostility or intense feelings. *Id.*, p 82, App. 66a. Regan described his prognosis as poor. *Id.*, p 92, App. 68a. There was no testimony offered at the hearing recommending that Respondent be treated as a juvenile.

Following the waiver hearing, the probate judge placed its findings on the record and essentially adopted Regan's testimony, *Id.*, p 143-149, App. 70a, and on March 27, 1987, the probate Judge subsequently issued a written opinion and order waiving Petitioner to the circuit court for trial as an adult. App. 78a.

Based on this record, the district court was able to fairly conduct the sort of analysis that courts routinely perform when they examine other claims of ineffective assistance of counsel. Just as a court may conclude that counsel was not ineffective for failing to move to suppress a confession because the facts of the confession did not give rise to an arguable Fifth Amendment claim, so too can a court look at the record of a juvenile waiver hearing and determine that Respondent did not have an arguable claim that he met the standard for being treated as a juvenile.

Unlike *Roe* Respondent was not denied the opportunity to have an attorney explore the potential merits of such an argument. Respondent was not deprived of a direct appeal of his conviction. During that appeal his appellate counsel could

have asserted the same claim of ineffective assistance of trial counsel, that Respondent presented in this action.

E. Conclusion

Hill and *Roe* involved unique circumstances in which the deficient performance of counsel deprived a criminal defendant of his trial or an opportunity to review the propriety of the conviction itself on appeal. The absence of these critical judicial proceedings made it difficult, if not impossible, for a reviewing court to determine whether the defendant had been actually prejudiced by his attorney's deficient performance. Here the record of the waiver proceedings and the appeal from conviction afforded the reviewing court the opportunity to determine actual prejudice. The Court of Appeals erred by unnecessarily extending this Court's presumed prejudice standard in *Roe* to these circumstances.

RELIEF

The petition for *certiorari* should be granted.

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Dated: February, 2005

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Nos. 03-1421/1501

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRIN T. HACKETT, ORDER
Petitioner-Appellant,

v.

ROBERT J. KAPTURE, WARDEN KINROSS CORRECTIONAL FACILITY,
Respondent-Appellee.

BEFORE: MOORE and COLE, Circuit Judges; and MARBLEY, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Nos. 03-1421/1501

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRIN T. HACKETT,

Petitioner-Appellant,

V. ORDER

ROBERT J. KAPTURE, Warden Kinross Correctional Facility,

Respondent-Appellee.

Before: MOORE and COLE, Circuit Judges; MARBLEY, District Judge.*

Darrin T. Hatchett, a Michigan state prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 34(i)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In late 1986 or early 1987, Hatchett was charged as a fifteen-year-old with first-degree murder and possession of a firearm during the commission of a felony (felony firearm). On March 10, 1987, the juvenile division of the probate court held an evidentiary hearing to determine whether the court should waive jurisdiction so that Hatchett could be tried as an adult in circuit court. At the conclusion of the hearing, the juvenile court waived jurisdiction.

*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Hatchett retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Hatchett at the preliminary examination in state district court, but he did not appeal the juvenile court's decision to waive jurisdiction. Hatchett then was bound over to the former Recorder's Court for the City of Detroit, Michigan, where he was represented by a different attorney (Rene Cooper). Following a bench trial on September 29, 1987, the trial court found Hatchett guilty of second-degree murder, and felony firearm. The trial court sentenced Hatchett to two years in prison for the felony firearm conviction and to life imprisonment, with the possibility of parole, for the murder conviction.

Hatchett filed an appeal of right through still another court-appointed attorney (Roman Karwowski). Karwowski argued that the evidence was insufficient to sustain the murder conviction and that Hatchett was entitled to re-sentencing because the sentence was excessive. The Michigan Court of Appeals affirmed Hatchett's conviction and sentence in an unpublished, per curiam opinion. The Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed.

On September 29, 2000, Hatchett filed his habeas corpus petition through counsel. He raised two substantive grounds for relief:

I. Mr. Hatchett is entitled to a new trial because he received constitutionally ineffective assistance from three different appointed attorneys, one of whom was entirely absent as proceedings were conducted, and another of whom inexplicably allowed. his right to appeal his waiver into Recorder's Court lapse without action, and the last of whom failed to raise any of these issues on appeal.

II. Mr. Hatchett's due process rights were violated when the Recorder's Court Judge failed to strike inaccurate information from the presentence report.

Hatchett supplemented his habeas petition with a third claim, which alleged that his right to due process was violated "by the prosecution's Motion to waive in violation of MCR 5.904(A)." The respondent moved for summary judgment on the ground that the statute of limitations barred habeas review, but on August 8, 2001, the district court denied the respondent's motion. The respondent then filed an answer to the habeas petition, arguing that Hatchett had procedurally defaulted his claims in state court by failing to raise them on direct appeal or in his first motion for relief from judgment. On April 11, 2002, the district court rejected the respondent's procedural default argument, but dismissed Hatchett's second and third claims, as well as his claim about attorney Jerome Crawford, on the merits.

The only issues that remained before the district court were Hatchett's claims that attorneys Charles Campbell and Roman Karwowski provided ineffective assistance. Oral argument on these claims were held on

February 19, 2003. The district court denied habeas corpus relief after concluding that Campbell's failure to appeal the waiver of juvenile jurisdiction did not prejudice Hatchett and that, to set aside Hatchett's conviction could result in a windfall to which the law does not entitle him. The district court found no merit in Hatchett's claim about his appellate attorney (Karwowski) because Campbell's performance did not prejudice Hatchett. The court granted Hatchett a certificate of appealability as to the ineffective assistance of counsel claim regarding attorneys Campbell and Karwowski. Hatchett then filed two duplicative notices of appeal (appeal No. 03-1421 and appeal No. 03-1501). The two resulting case numbers have been consolidated.

We review de novo a district court's legal conclusions in habeas corpus actions and review its factual findings for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999). A district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination or me facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

On appeal to this court, Hatchett claims that the district court applied an incorrect legal standard when it interpreted the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) to mean that Hatchett's counsel was constitutionally ineffective for not filing an appeal from the juvenile court's decision to waive jurisdiction only if Hatchett could show that the appeal was meritorious. Hatchett argues that to prove

his ineffective assistance of counsel claim under the Sixth Amendment, he need not show the merit of his appeal, but must show (1) that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 687, and (2) that counsel's deficient performance prejudiced the defendant. *Id.* at 692. We agree.

Prejudice is sufficient to satisfy the second prong of *Strickland*. Prejudice is presumed from counsel's failure to file a notice of appeal when requested by his client. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). The district court, however, concluded that Hatchett must in addition demonstrate in his 28 U.S.C. 2254 petition that his appeal had some merit. In *Roe*, the Supreme Court held that counsel's failure to pursue an appeal requested by a defendant constitutes ineffective assistance of counsel regardless of the likelihood of success on the merits. *Id.* at 486. Moreover, even if a defendant does not specifically instruct counsel to file an appeal, counsel may still have a duty to consult with his client about an appeal. *Id.* at 478-80.

The record in this case does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Hatchett's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in the state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here. . . ." Later, however, he agreed to proceed with the preliminary examination. Because Hatchett's uncle retained counsel to appeal, it is clear that Hatchett would have appealed. Therefore, the district court erred

in dismissing Hatchett's habeas petition as to this claim by examining the potential merits of a possible appeal.

Accordingly, the district court's judgment as to this ineffective assistance of counsel claim is vacated and the case is remanded for consideration in light of *Roe*. Appeal No. 03-1501 is dismissed as duplicative of appeal No. 03-1421, Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRIN T. HATCHETT,
Petitioner,
v. CASE NO. 00-CV-74340-DT
HONORABLE NANCY G. EDMUNDS

ROBERT J. KAPTURE,
Respondent.

OPINION AND ORDER DENYING HABEAS CORPUS PETITION

This matter is pending before the Court on petitioner Darrin T. Hatchett's habeas corpus petition filed under 28 U.S.C. § 2254. For the reasons set forth below, the habeas petition shall be denied.

I. Background

This case arose when Petitioner was charged as a fifteen-year-old with first-degree murder and possession of a firearm during the commission of a felony (felony firearm). On March 10, 1987, the juvenile division of the probate court held an evidentiary hearing to determine whether the court should waive jurisdiction so that Petitioner could be tried as an adult in circuit court. At the conclusion of the hearing, the probate court waived jurisdiction.

Petitioner retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Petitioner at the preliminary examination in state district court, but he did not appeal the probate court's decision to waive jurisdiction. Petitioner then

was bound over to the former Recorder's Court for the City of Detroit, Michigan, where he was represented by a different attorney. Following a bench trial on September 29, 1987, the trial court found Petitioner guilty of second-degree murder, MICH. COMP. LAWS § 750.317, and felony firearm, MICH. COMP. LAWS § 750.227b. The trial court sentenced Petitioner to two years in prison for the felony firearm conviction and to life imprisonment, with the possibility of parole, for the murder conviction.

Petitioner appealed his conviction and sentence through attorney Roman Karwowski, who argued that the evidence was insufficient to sustain the murder conviction and that the sentence was excessive. The Michigan Court of Appeals found no merit in the claims and affirmed Petitioner's conviction and sentence in an unpublished, *per curiam* opinion. See *People v. Hatchett*, No.104510 (Mich. Ct. App. Mar. 10,1989). The Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed. See *People v. Hatchett*, No. 85743 (Mich. Sup. Ct. Nov. 29, 1989).

In 1992, Petitioner filed a pro se motion for relief from judgment in the trial court. The trial court denied Petitioner's motion in a reasoned opinion. On March 14; 1994; the trial court vacated its previous order because Petitioner had asked to withdraw his motion before the trial court denied it.

On September 3, 1997, Petitioner filed a second motion for relief from judgment. The trial court denied the motion because, in its opinion, Petitioner had failed to meet the stringent standards of Michigan Court Rule 6.508(D)(3). Petitioner appealed the trial court's decision, but the Michigan Court of Appeals denied

leave to appeal, citing Michigan Court Rule 6.508(D). See *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999). On September 29, 1999, the Michigan Supreme Court likewise denied leave to appeal. See *People v. Hatchett*, 461 Mich. 877; 602 N.W.2d 580 (1999) (table).

On September 29, 2000, Petitioner filed his habeas corpus petition through counsel. He raised two substantive grounds for relief:

> I. Mr. Hatchett is entitled to a new trial because he received constitutionally ineffective assistance from three different appointed attorneys, one of whom was entirely absent as proceedings were conducted, and another of whom inexplicably allowed his right to appeal his waiver into Recorder's Court lapse without action, and the last of whom failed to raise any of these issues on appeal.
>
> II. Mr. Hatchett's due process rights were violated when the Recorder's Court Judge failed to strike inaccurate information from the presentence report.

Petitioner supplemented his habeas petition with a third claim, which alleged that his right to due process was violated "by the prosecution's Motion to Waive in violation of MCR 5.904(A)."

Respondent moved for summary judgment on the ground that the statute of limitations barred habeas review, but on August 8, 2001, the Court denied Respondent's motion. Respondent then filed an answer to the habeas petition, arguing that Petitioner had

procedurally defaulted his claims in state court by failing to raise them on direct appeal or in his first post-conviction motion. On April 11, 2002, the Court rejected Respondent's procedural default argument, but dismissed Petitioner's second and third claims, as well as his claim about attorney Jerome Crawford, on the merits.

The only issues currently before the Court are Petitioner's claims that attorneys Charles Campbell and Roman Karwowski provided ineffective assistance. Oral arguments on these claims were held on February 19, 2003.

II. Standard of Review

Petitioner is entitled to the writ of habeas corpus only if he can show that the state court's adjudication of his claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(4).

This deferential standard applies even when a state court fails to articulate its reasoning for a decision on the merits. *Onifer v. Tyszkiewicz*, 255 F.3d 313, 316 (6th Cir.) *cert. denied*, 534 U.S. 930 (2001). The question in such circumstances is "whether the state

court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented..... *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001)). A federal court's independent review of the record remains deferential to the state court's result. *Id.*

III. Discussion

Petitioner alleges that Charles Campbell, who represented him after the juvenile waiver hearing, should have appealed the probate court's decision to waive jurisdiction. Petitioner contends that his appellate attorney, Roman Karwowski, should have ordered the probate court transcripts and raised the issue on appeal or argued that Campbell's representation was ineffective.

A. *Strickland v. Washington*

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is "reasonably effective assistance." *Id.* The petitioner must demonstrate that his attorney's "representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong of the Strickland test requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"*Strickland* qualifies as clearly established federal law under § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 391(2000)." *Monzo v. Edwards*, 281 F.3d 568, 583 (6th Cir. 2002). The question then is whether the state court's denial of relief "is contrary to federal law. unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented..... *Harris*, 212 F.3d at 943.

B. Waiver of Probate Court Jurisdiction

A juvenile court's determination of whether to waive jurisdiction is a "critically important" proceeding. *Kent v. United States*, 383 U.S. 541, 560 (1966). At the time of the offense in this case, the juvenile division of the probate court had exclusive original jurisdiction over a person under the age of 17 who was alleged to have violated a state or federal criminal law. *Dickens v. Jones*, 203 F. Supp. 2d 354, 361(E.D. Mich. 2002) (Tarnow, J.). The probate court was required to follow a two-step process. First, the court had to determine whether there was probable cause to believe that the juvenile had committed a felony. *Id.* (citing MICH. COMP. LAWS § 712A.4(3)). Then, the court had to determine whether the interests of the juvenile were best served by waiving jurisdiction so that the juvenile could be tried as an adult in a criminal court. *Id.* (citing MICH. COMP. LAWS § 712A.4(4)). The court was required to consider the following five criteria when determining whether to waive jurisdiction:

> "(a) The prior record and character of the child, his physical and mental maturity and his pattern of living.

> "(b) The seriousness of the offense.
>
> "(c) Whether the offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.
>
> "(d) The relative suitability of programs and facilities available to the juvenile and criminal courts for the child.
>
> "(e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender."

People v. Dunbar, 423 Mich. 380, 385-86; 377 N.W. 2d 262, 263-64 (1985) (quoting MICH. COMP. LAWS § 712A.4(4)). The Michigan court rule was "substantially identical." *Id.*, 423 Mich. at 386; 377 N.W. 2d at 264.

A juvenile was entitled to an appeal of right in circuit court from the probate court's waiver of jurisdiction. *People v. Jackson*, 171 Mich. App. 191,195-96; 429 N. W. 2d 849, 852 (1988). After the deadline for filing a claim of right expired, he could apply for leave to appeal in the circuit court. *Id.*, 171 Mich. App. at 196; 429 N.W.2d at 852. Failure to appeal the juvenile court's decision to waive jurisdiction barred review of the issue in the Michigan Court of Appeals. *Id.*; *People v. Mahone*, 75 Mich. App. 407, 410; 254 N.W.2d 907, 909 (1977).

The standard for reviewing a juvenile court's waiver of jurisdiction over a juvenile defendant read as follows:

> "[W]e hold that an order waiving jurisdiction will be affirmed whenever the judge's findings, based upon substantial evidence and upon thorough investigation, show either that the juvenile is not amenable to treatment, or, that despite his potential for treatment, `the nature of his difficulty is likely to render him dangerous to the public, if released at age [nineteen], or to disrupt the rehabilitation of other children in the program prior to his release.'
>
> "We believe this holding hews a close line between the often competing interests of the juvenile and society. We emphasize, however, that the 'serious of the offense,' may not alone be used to determine the likelihood that a potentially amenable juvenile will endanger the public or other children in a rehabilitation program. The Legislature and the Supreme Court have indicated by statute and rule, respectively, that all of the waiver criteria shall be considered; thus, no reason appears why the 'seriousness of the offense' should gain preeminence over other factors to be assessed."

Dunbar, 423 Mich. at 387-88; 377 N.W. 2d at 264-65 (quoting *People v. Schumacher*, 75 Mich. App. 505, 511-12; 256 N.W.2d 39 (1977) (footnote and citations omitted)).

In 1988, the Michigan legislature amended the law to provide for automatic waiver of jurisdiction to circuit court of juveniles aged 15 to 17 who are charged with certain felonies, including murder. Dickens, 203 F.

Supp. 2d at 361-62 (citing MICH. COMP. LAWS § 600.606). This provision became effective after Petitioner's trial, but before the Michigan Court of Appeals affirmed his conviction and sentence.

C. The State Court Proceedings

Attorney Charles Campbell did not appeal the juvenile court's waiver of jurisdiction, and his failure to do so precluded Petitioner from raising the issue in the Michigan Court of Appeals. *Jackson*, 171 Mich. App. at 195; 429 N.W. 2d at 852. Petitioner alleges that Campbell squandered his best chance at avoiding exposure to a life sentence.[1]

The record does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Petitioner's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here. . . ." (Tr. Mar. 23, 1987, at 3). Later, however, he agreed to proceed with the preliminary examination. *Id.* at 3-5.

footnote begins

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[1] Had Petitioner been sentenced as a juvenile, he could have been released when he turned nineteen. (Tr. Mar. 10, 1987, at 81-82).

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footnote ends

Had Campbell acquired the transcript of the probate court hearing, the record would have revealed that child

psychologist Thomas Regan recommended "long term incarceration because of the morbidity of his pathology and his instability." (Tr. Mar. 10, 1987, at 71). Regan thought that time spent in the juvenile system would be insufficient to rehabilitate Petitioner. *Id.* at 71-72.

The trial court heard testimony from other experts at the hearing and then made the following findings:

> THE COURT: Based on the information the Court has before it, the Court makes the following findings relative to the criteria set forth in [the] statute relative to waiver.
>
> In terms of prior record, the Court finds that there is no prior record.
>
> In terms of character of the child, the court adopts the description set forth by Mr. Regan in his report. Specifically, that personality tests reveal a very angry and confused youngster who would be upset and agitated much of the time. An individual with this profile may have difficulty coping with the routine everyday living. They are usually overwhelmed to achieve or accomplish much of anything.
>
> Darrin's reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic. This is the type of youngster who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.
>
> Darrin demonstrates some interest in others and has the ability to identify, but his

agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Darrin has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. This is the type of youngster who, once stimulated, would become very intense in the expression of his feeling and have difficulty backing off.

There are some strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

In terms of his maturity, he is a person physically and mentally mature. He is operating at the reading grade level of 5.4 and arithmetic level of 5.3.

In terms of his pattern of living, he comes from predominantly a single parent home where the parent is a female.

His father has chosen to abandon him at a very early age and has had minimal contact with his son. His father certainly does not provide a role model for his son, given his criminal background.

His mother I think probably has tried the best she can under the circumstances to provide for her son. Unfortunately, she has failed to provide him with a positive role model until very recently. It seems that until recently, until her recent marriage, she

basically has provided him with basically a female oriented home and/or a home where a male is involved but who is not of a positive role model.

I think that the grandmother has tried to be supportive of her daughter and of her grandson and has tried to intervene whenever it's been necessary for her to intervene, and to provide for her grandchild, probably to the best of her ability.

And I think that the mother herself has had a lot of problems. It seems as though she's been able to work those problems out. She had a drug addiction in her history and she has been committed to the Michigan Department of Corrections for some criminal involvement relative to unarmed robbery.

So this youngster has been exposed to a lot of negative criminal activity in relationship to the people that should be very meaningful to him. And so he has not had very positive role models.

He has not functioned well in school, and his grades certainly are evident of that.

I think until very recently, he's been able to maintain himself within the community without too much visibility in terms of criminal activity. But it's almost as though it's been festering within him and been building up. And when he ultimately does exhibit the antisocial behavior that's been building up within him, he doesn't mess around with the

small stuff; he goes right to the very big time an[d] deprive[s] somebody of their life.

According to the mother and the grandmother, he seems to be a person who has exhibited many of the interests that other children his age would normally show an interest in. So other than this lack of parental responsibility and the shifting between relatives, relative to care, it seems that his life is not any more unusual than many youngsters in our community.

In terms of seriousness of the offense, there's no doubt that murder first degree and felony firearm are extremely serious offenses.

In terms of whether this offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination the child may be beyond rehabilitation under existing juvenile programs and statutory procedures, the Court finds that that criteria is not applicable to this case, in that we do have a serious offense here. And secondly, there is no repetitive pattern of offenses.

In terms of relative suitability of programs and facilities available in the juvenile and criminal courts for the respondent, the juvenile justice system has an array of resources available to it. It has the Positive Peer Culture program, the Guided Group Interaction program, which is their predominant treatment modality.

Those are treatment modalities where group intervention is used to promote values within those that participate.

Based on the type of profile that has been projected by Mr. Regan and presented to the Court, it would appear that he is not a likely candidate that would benefit from either one of those programs, because these are programs where youngsters are dealing with their peers, where there is confrontation. And based on his profile, he is very likely to respond in a negative fashion and very quickly, and ultimately become disruptive of the program.

In terms of the Intensive Treatment, which is a small program available, and in terms of the juvenile justice system, it would appear that he is not an appropriate candidate for that program, because apparently that program deals with more vulnerable types of youngsters and not the kind that we have before us.

In terms of the camps, which would be the other programs provided by the Department of Social Services, it's clear from the testimony of the representative from the Department of Social Services that he would not be a candidate for that program, if in fact he were found guilty of this offense.

And so it would appear that those resources that are available in the juvenile justice system are not the kinds of programs that would be successful with this respondent, given his character and his personality traits.

It would appear that he's more in need of something that is akin to behavior modification, and that is not available in the juvenile justice system. He needs structure, supervision, educational and vocational training, with a milieu of behavior modification. And it would appear that those kinds of resources are available in the adult system.

I think the bottom line is that while the juvenile justice system has many programs, the nature of this youngster, given his personality and his diagnosis, is such that his prognosis, if subjected to those programs, would be very poor. It would seem that his problems are so deep-seated that it is going to take an extensive period of time to deal with him all his problems to get him to a point where he might continue to operate in our community in an appropriate fashion.

And our system is such that we must release him at age 19. And the evidence by the professionals is that he is not likely to be rehabilitated to the point where he would not be dangerous when released at age 19. So it would appear that we just do not have the time within which to work, even if he were amenable to the kind of treatment available to him in the juvenile justice system.

And then, finally, whether the best interest of the public welfare and protection of security is such that he should stand trial as an adult. It appears to me that if he is indeed

> guilty of the offenses of which he is charged, he is a very dangerous individual and needs to be put in a position where the public will not be in danger. And I would think that the priority here should be the safety of the public, and that is the priority of the adult system; and, therefore, it would be more appropriate that he be placed there.

Id. at 143-49.

To summarize, the court considered the statutory factors, namely, any prior record, the character of the child, his physical and mental maturity and pattern of living, the seriousness of the offense and whether it was part of a repetitive pattern, the suitability of available programs and facilities, and whether it was in the best interests of the public welfare and the protection of the public security that Petitioner stand trial as an adult offender. The court concluded that the criteria for waiver had been met and that Petitioner should be tried as an adult. *Id.* at 149.

Given the probate court's reasoned opinion, as well as the nature of the crime and the recommendation of an expert witness that Petitioner be tried as an adult, it is unlikely that Petitioner would have prevailed if Charles Campbell had appealed the probate court's decision to waive jurisdiction. Petitioner has not demonstrated a reasonable probability that, but for Campbell's failure to appeal the probate court's decision, the result of the proceeding would have been different. The Court of Appeals for the Sixth Circuit reached the same conclusion in a similar case. See *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) (finding no prejudice in defense counsel's failure to appeal the waiver of juvenile court jurisdiction where

the petitioner was charged with murder and it was likely that he would have been transferred to adult court again if error were found on appeal and he was granted another transfer hearing).

Furthermore, to set aside a conviction or sentence solely because the outcome might have been different but for counsel's error could result in the defendant receiving a windfall to which the law does not entitle him. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993). Sheer outcome determination is "not sufficient to make out a claim under the Sixth Amendment." *Id.* at 370. "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding. . . ." *Id.* The result of the proceeding in this case was neither unfair nor unreliable in light of the 1988 amendment in the law, which provided for automatic waiver of jurisdiction to circuit court for a fifteen-year-old juvenile charged with murder.

IV. Conclusion

The Court concludes that, even if Charles Campbell's performance was deficient, his performance did not prejudice Petitioner. Petitioner's inability to show prejudice defeats his ineffectiveness claim as to Charles Campbell. Because Campbell was not ineffective, the Court's "inquiry is at an end; by definition, appellate counsel [Roman Karwowski] cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell,* 264F.3d 663, 676 (6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002). Accordingly, the state courts' denial of relief did not result in a decision that was contrary to federal law, an unreasonable application of clearly established law, or an unreasonable determination of the facts. Petitioner's application for the writ of habeas corpus is **DENIED**.

The Court declines to hold an evidentiary hearing because Petitioner's claims lack merit and because the parties have informed the Court that Charles Campbell is deceased and that Roman Karwowski has no memory of the case and no file on it. The Court is not convinced that, even if the facts were more fully developed, Petitioner would be able to demonstrate entitlement to relief. *Byrd v. Collins*, 209 F.3d 486, 550 (6th- Cir. 2000) (Jones, C.J.; dissenting) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)), *cert. denied*, 531 U.S. 1082 (2001); see also *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001) (affirming the district court's denial of an evidentiary hearing in part because the petitioner's claims lacked merit), cert. denied, __ U.S. __, 123 S. Ct. 136 (2002).

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NANCY G. EDMUNDS
UNITED STATES DISTRICT
JUDGE

Date: March 6, 2003

STATE OF MICHIGAN
COURT OF APPEAL

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

No. 104510

DARRIN HATCHETT,
Defendant-Appellant.

Before:McDonald, P.J., and Doctoroff and Neff, JJ.
PER CURIAM.

Following a bench trial on September 27, 1987, defendant was convicted of second-degree murder, MCL 750. 317; MSA 28.549 and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment on the second-degree murder conviction and two years' imprisonment on the felony-firearm conviction. Defendant now appeals as of right and we affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence of malice to allow a rational trier of fact to conclude that this element of second-degree murder had been established beyond a reasonable doubt. Defendant also contends that the prosecutor failed to prove that defendant's actions were without justification, mitigation, or excuse and that the prosecutor failed to disprove defendant's claim of self-defense beyond a reasonable doubt. We believe that defendant's contentions are without merit.

To determine if there is sufficient evidence to support a conviction, the court must view the evidence in a light most favorable to the prosecution, and

determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), reh den 407 Mich 1164 (1980), cert den sub nom Michigan v Hamption, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980); People v Petrella, 424 Mich 221, 268-269; 380 NW2d 11 (1985).

The elements of second-degree murder are (1) that a death occurred, (2) that the death was cauaed by the defendant, (3) that the killing was done with malice, and (4) that it was done without justification or excuse. People v Porter,169 Mich App 190, 192; 425 NW2d 514 (1988), lv den 431 Mich 883 (1988).

Malice is the intention to kill, the intention to do great bodily harm, or the intention to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm is the probable result. People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984); Porter, supra, 192-193. Malice must be established from circumstances that do not constitute excuse or justification or mitigate the degree of offense to manslaughter. Malice may be inferred from the facts and circumstances of the killing. Porter, supra, 193.

The trial judge found sufficient intent because defendant had the gun and fired it at the victim. Because there were multiple shots and because the victim was shot twice in the head, the trial court judge was convinced beyond a reasonable doubt that defendant intended to kill the victim. After reviewing the record and viewing the evidence in the light most favorable to the prosecution, we believe that the trial judge did not err in finding that the evidence was sufficient to support defendant's conviction.

We also believe that the trial court did not err in finding that the defense of self-defense was not available to defendant in this case. The testimony at trial revealed that defendant was the initial aggressor. The defense of self-defense is unavailable to an aggressor in a conflict. People v Livery Clark, 172 Mich 407, 418; ___ NW2d ___ (1988).

Defendant next. contends that he is entitiled to resentencing because his sentence of life imprisonment for the second-degree murder conviction was excessive. We disagree.

Our review of defendant's sentence is guided by People v Coles 417 Mich 523; 339 NW2d 440 (1983). Based on the standard enunciated in Coles, we cannot conclude that defendant's sentence was excessive. Given the facts of this case, defendant's sentence does not shock our consciences.

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

Order

Michigan Supreme Court
Lansing, Michigan

Entered: November 29, 1989

Dorothy Comstock Riley
Chief Justice

~~85~~743 & (29)

Charles L. Levin
James H. Brickley
Michael E Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

PEOPLE 0F THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 85743
COA:104510
LC: 87-002645

DARRIN HATCHETT,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal and request for review under MCR 7.303, are considered. Since the defendant has applied for leave to appeal, the letter request is DENIED as moot. The delayed application is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

41121

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 1989

/s/
Corbin R. Davis

Court of Appeals, State of Michigan

ORDER

Jane E. Markey
Presiding Judge

People of MI v Darrin Hatchett

Docket No. 209790

LC No. 87-002645

Barbara B. McKenzie
David H. Sawyer

Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL OF THE MICHIGAN COURT OF APPEALS

A true copy entered and certified by Carl L. Gomek, Chief Clerk on

March 1, 1999

/s/
Carl L. Gromek

Order

Michigan Supreme Court
Lansing, Michigan

Entered: September 29, 1999
114355

Elizabeth A. Weaver,
Chief Justice
James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Mauna D. Corrigan
Robert P. Young, Jr.,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 114355
COA: 209790
Rec Ct: 87-002645

DARRIN HATCHETT,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal from the March 1, 1999 decision of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

H0921

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 1999

/s/
Corbin R. Davis

[Testimony of Eric Minor, Transcript dated September 29, 1987, pp 8-13]

[Page 8, T, 9/29/87]

A. Yes.

Q. Mr. Minor, I would like to draw your attention to December 29, 1986, at about 6:15, in the evening, and ask you if at that time, you were at a residence in the City of Detroit known as 9145 Mendota?

A. Yes.

Q. Who lived there, sir?

A. Michael.

Q. What were you doing there?

A. Playing pool.

Q. Anyone else there?

A. Yes.

Q. Who all was there?

A. K.C., Rodney and Darrin.

Q. K.C. and who?

A. Rodany and Darrin.

Q. Rodney McCrae?

A. Yes.

Q. Is that person known by Lloyd Whitfield, K.C.?

A. Yes.

Q. You said that you were playing pool.
Who were you playing pool with?

A. Rodney.

Q. Did something happen while playing pool?

A. Yes.

[Page 9, T, 9/29/87]

Q. What happened, sir?

A. Darrin shot Rodney.

Q. Did you see that happen?

A. Yes.

Q. Prior to Darrin shooting Rodney, anyone say anything to each other?

A. Yes.

Q. Did Rodney say anything to –

A. Hi to him.

Q. Did he say anything else? Do you remember?

MR. COOPER: Actually, Judge, I object on the grounds of hearsay, what Rodney said. I don't see any exception.

THE COURT: Part of the res gestae. Overrule the objection.

MR. COOPER: Okay.

MR. BECK: Do you remember if Rodney said anything?

A. You still mad at me?

Q. (By Mr. Beck). Who did he say that to?

A. Darrin.

Q. Did you know what he was talking about at that time?

A. No.

Q. Did Darrin say anything to Rodney as a result of Rodney asking him are you still mad at up?

[Page 10, T, 9/29/87]

A. Told him to shut up, punk.

Q. What happened?

A. Darrin left.

Q. Did you see where he went?

A. No.

Q. Do you know if he left Michael Howard's house?

A. Yes.

Q. How do you know that?

A. He went outside the side door.

Q. Did there come a time when Darrin came back?

A. Yes.

Q. How long was it between the time he left and the time he came back?

A. About five minutes.

Q. After he came back, what happened then?

A. He ran down the stairs and started shooting.

Q. Did he say anything before he started shooting?

A. He said - -

THE COURT: We are trying to understand you. Slow down.

THE WITNESS: Talk your junk now, punk.

Q. (By Mr. Beck). Who did he say that to?

A. Rodney.

Q. Where was Rodney?

A. On the side of the pool table with me.

[Page 11, T, 9/29/87]

Q. You said that you saw Darrin shoot him. Did you see where Darrin shot him?

A. No.

Q. Do you know how many times Darrin shot?

A. About five.

Q. What did Rodney do after he shot?

A. Fell.

Q. After Rodney fell, did Darrin shoot anymore?

A. After he fell, I ran up the stairs. Then he ran up after me.

Q. Who did?

A. Darrin, and he clicked the gun, but no bullets.

Q. Was he pointing the gun anywhere?

A. At me.

Q. Did he say anything to you?

A. He said, what I'm doing? I was going outside. He said, if I say something -- if I tell, he'll blow my house up.

Q. After that, did anything happen, sir?

A. Yes, we left.

Q. Who left?

A. Me and Darrin.

Q. What did you do when you left?

A. He said that he had to get one of his friends to help him get the body out.

Q. Did you go get one of his friends?

[Page 12, T, 9/29/87]

A. Yes.

Q. What did you do after you got this person?

A. Came back.

Q. And what happened then when you came back? Did you go back into the house?

A. Yes.

Q. Back in the basement?

A. Yes.

Q. Rodney still there?

A. Yes.

Q. What happened then?

A. His friend looked and left.

Q. He looked?

A. At the body, and he ask me why he do it, and left.

Q. Did you know what that person's name was?

A. No.

Q. Could you tell what kind of gun Darrin had when he shot?

A. All I know it was small, black and a revolver.

Q. Had there been any arguments in your presence while playing pool with Darrin McCrae and Darrin Hatchett? Any argument between the two?

A. No.

Q. Did Rodney have any weapons?

A. No.

Q. Now, this individual that came back made a statement to **[Page 13, T, 9/29/87]** Mr. Hatchett after he viewed the body, after the person that you and Mr. Hatchett went to get to help remove the body.

He came back and went into the basement?

A. He didn't go in the basement. He stood in the doorway.

Q. Stood in the doorway?

A. Yes.

Q. Rodney's body could be seen from the doorway?

A. Yes.

Q. He made a statement to Darrin?

A. Yes.

Q. Did Darrin say anything after that person made the statement to Darrin, after he asked him that question?

A. Not that I know of.

Q. Did Darrin do anything -- well, did you eventually - - was Rodney's body moved?

A. Yes.

Q. How was it moved? What happened to his body?

A. We put it in a dumpster.

Q. Who did that?

A. Me, Darrin, Michael--- I don't really know if K.C. did or not.

Q. How did you get to the dumpster?

A. Picked up.

Q. After it was put in the dumpster, did you go back into

[Testimony of Michael Howard, Transcript dated September 29, 1987, pp 34-38]

[Page 34, T, 9/29/87]

MICHEAL HOWARD

called as a witness on behalf of the People, was duly sworn in by the Court Clerk and testified as follows:

DIRECT EXAMINATION

BY MR BECK:

Q. What is your name young man?

A. Michael Howard.

Q. How old are you?

A. Sixteen.

Q. Mr. Howard, I would like to draw your attention to last December 29th?

A. Uh-huh.

Q. At about 6:30, 6:15 in the evening, were you living at 9145 Mendota, City of Detroit?

A. Yes, I was.

Q. Were you, in fact, at home at that time?

A. Yes.

Q. Do you remember who was there with you?

A. Me, Darrin, Rodney and Lloyd.

Q. Is that K.C.?

[Page 35, T, 9/29/87]

A. Yes and Eric.

Q. Eric Minor?

A. Uh-huh.

Q. Were you all in the basement?

A. Yes.

Q. What were you doing at that time?

A. I was just downstairs.

Q. Was anybody shooting pool?

A. Yes.

Q. Who was?

A. Rodney, and I think Eric.

Q. Now, did you observe any disagreement or arguments while you were down there?

A. No.

Q. Did you hear whether or not Rodney MaCrae said anything to Darrin Hatchett?

A. Yes.

Q. What did he say to him?

MR. COOPER: Objection. Same objection.

THE COURT: That objection is preserve. I think it is part of the res gestae.

A. He said, how you doing? Hello.

Q. (By Mr. Beck). Something to that effect?

A. What?

Q. What's up, or how you doing?

A. Yes.

[Page 36, T, 9/29/87]

Q. Darrin Hatchett say anything to him?

A. Don't say nothing to me.

Q. By the way, I'll ask you if you see Darrin Hatchett in the court?

A. Yes.

Q. Seated next to Mr. Cooper?

A. Yes.

Q. Thank you.

What happened after Mr. Hatchett spoke to Rodney McCrae?

A. He had left.

Q. Who left?

A. Darrin.

Q. Did you see him leave?

A. Yes.

Q. Do you remember how he left?

A. Through the side door.

Q. And what happened then?

A. Then K.C. went upstairs, and Eric an rodney (sic) were still downstairs. Darrin came back.

Q. Where were you?

A. At that time I went upstairs because we were eating and came back down and answered the door, and K.C. went up to use the bathroom and Darrin came down and shot Rodney.

Q. Did you see that?

[Page 37, T, 9/29/87]

A. Yes.

Q. Where were you when you saw that?

A. First I was on the stairs.

Q. Were you - - Which stairs were you on? There are two steps, one coming from upstairs to the landing—

A. The one from the basement.

Q. Do you remember how many times Darrin shot Rodney?

A. Four.

Q. Do you remember how far a part they were? Can you tell me here in court? I will walk up and you let me know.

A. Right there.

Q. About right here?

A. Yes.

Q. How wide is your basement?

A. Probably from the wall to about where you are standing.

MR. BECK: Counsel would you stipulate about 23 feet?

MR. COOPER: Okay.

Q. (By Mr. Beck) . Was there anything obstructing the area or when Darrin shot Rodney?

A. Pool table.

Q. What kind of pool table do you have?

A. About a seven footer.

Q. Do you remember how the shots were fired?

A. Yes.

[Page 38, T, 9/29/87]

Q. How were they fired?

A. He first shot him in the his chest or the heart, and then in the side, and then he fell, and then he shot him twice in the head.

Q. When he fell -- Rodney fell?

A. Rodney fell.

Q. After Rodney fell, did Darrin get any closer to Rodney?

A. Yes, he went around the pool table where Rodney was laying, and he was probably about three away from him. Two or three feet.

Q. And then?

A. Shot him twice in the head.

Q. Did you see that?

A. Yes.

Q. Do you remember whether or not Darrin said anything to Rodney when he came down the steps?

A. Yes.

Q. What was that?

A. What was all of that that you were saying, and then Rodney looked, and he pulled the pistol and he shot, and Rodney grabbed his chest and said, he shot me, and Darrin shot him again and he fell to the ground, and I said, no more, and he went and shot him twice to the head.

Q. Did you ever see Rodney threaten Darrin?

A. No.

[Testimony of Lloyd Whitfield, Transcript dated September 29, 1987, pp 59-62]

[Page 59, T, 9/29/87]

LLOYD WHITFIELD

called as a witness on behalf of the People, was duly sworn in by the Court Clerk and testified as follows:

DIRECT EXAMINATION

BY MR. BECK:

Q. What is your name, young man?

A. Lloyd.

Q. Lloyd what?

A. Whitfield.

Q. You got a nickname?

A. K.C.

Q. How old are you?

A. Sixteen.

Q. You know somebody by the name of Darrin Hatchett?

A. Yeah.

Q. See him in court?

A. Yes.

Q. Point to him, please, and tell me what he is wearing?

A. Guy with a sweater and afro.

MR. BECK: Indicating the person of the defendant.

[Page 60, T, 9/29/87]

Q. (Continuing). I will draw your attention to December 29, 1986, at about 6 o'clock in the evening, 6:15, in the that area. Were you at Michael Howard's house?

A. Yes.

Q. On Mendota Street?

A. Uh—huh.

Q. Do you remember who else was there?

A. Michael, Howard, Eric, me and him. Rodney.

Q. Now, how long had you been at Michael's house that day before the incident took place?

A. All day.

Q. Been there all day. Were you on Christmas vacation or something? You have to answer yes or no?

A. Yes.

Q. Because he is taking it down. That's why you have to speak.

I want to ask you if there was a time that you played any pool down there that day?

A. Yes.

Q. Who did you shoot pool with?

A. Yes.

Q. With who?

A. Mike.

Q. About 6 o'clock, were you doing anything in particular? Were you downstairs, upstairs?

[Page 61, T, 9/29/87]

A. I think we were playing pool. I went to use the bathroom.

Q. I will ask you about that.

When you up in the bathroom, did you hear anything when in the bathroom?

A. I heard shots.

Q. How many did you hear?

A four.

Q. Do you recall how they occurred; in other words, I'm asking you, did it all happen at once or any space between any of them?

A. It was first two. Then about two or three seconds later the last two.

Q. After you heard those, what did you do?

A. I jumped up and went downstairs.

Q. Did you see anything downstairs?

A. Yes.

Q. What did you see?

A. I saw Rodney laying on the floor.

Q. See anybody else in the basement?

A. Uh-huh. Yes. Everybody.

Q. What was everybody doing?

A. Staring at Rodney.

Q. Did you see Darrin?

A. Yes.

[Page 62, T, 9/29/87]

Q. Did you say anything to him?

A. No.

Q. Did Darrin say anything when you saw him?

A. He was excited.

Q. Did he say anything?

A. He was just cussing. He said that he didn't want to go back to jail.

Q. Did he say anything about Rodney, if you recall?

A. He said that he shouldn't have made him mad.

Q. While in the basement, were you down there while Rodney and Darrin Hatchett were down there together?

A. Yes.

Q. Did you-- before the shooting, did you see any argument or anything down there?

A. No.

Q. Did you ever see Rodney with a weapon of any kind?

A. No.

Q. After you went down there and saw everybody, what happened then?

A. Darrin had left.

Q. And what did you do after he left?

A. We cleaned up the blood.

Q. Did Darrin come back?

A. Uh—huh. Yes.

Q. Was he alone when he came back?

[Testimony of Darrin Hatchett, Transcript dated September 29, 1987, 79-81]

[Page 79, T, 9/29/87]

opened the door up, and I was going in the basement and Michael said he would be down in the minute because he was eating. When I got in the basement, I went to the other side of the room, and me and Rodney were arguing a little more, and I pulled the gun and said, talk your junk. I aimed the gun like that and said that and I fired it, and I didn't know if he grabbed--- it looked like he went for something and I shot some more.

Q. First of all, are you right or left-handed?

A. Left-handed.

Q. You have the gun in a pocket?

A. Yes.

Q. Which one?

A. Left pocket.

Q. In what item of clothing?

A. Coat.

Q. You pulled it out?

A. Yes.

Q. This is during an argument?

A. Yes.

Q. Still arguing?

A. Yes.

Q. When you saw him down there, why didn't you leave?

A. I figured they would be leaving again pretty soon.

Q. But the arguing continued?

[Page 80, T, 9/29/87]

A. Yes.

Q. You pulled the gun out and said something like, talk your junk now?

A. Yes.

Q. You got the gun?

A. Yes.

Q. Figured he would shut up?

A. Yes.

Q. Did he shut up?

A. No.

Q. So you aimed it where?

A. I tried to aim it on the side of him, like more to go pass his shoulder.

Q. Did you pull the trigger?

A. Yes.

Q. You don't know if that first bullet hit him or not?

A. Yes.

Q. But he grabbed in that direction?

A. Yes.

Q. Did you know if he was grabbing-- did you know where he was grabbing?

A. No.

Q. Grabbing like toward his side?

A. Yes.

Q. Then what goes on in your mind, Mr. Hatchett?

[Page 81, T, 9/29/87]

A. I thought that he was going for something. I thought a gun, and then I started firing some more.

Q. You heard testimony that you shot him in the head?

A. Yes.

Q. Is that the true?

A. Yes.

Q. Were you aiming at the head or aiming at the body?

A. I was just aiming.

Q. How many shots— how many times did you pulled the trigger?

A. Four.

Q. Okay. You realize this person was dead?

A. He wasn't dead at that time.

Q. After the four shots, he was not dead yet?

A. No.

Q. What led you believe he was not dead?

A. He was still moving.

Q. He was on the floor though?

A. Yes.

Q. Okay. Then what do you do?

A. After I shot him, we were standing there looking. Eric had jumped. He tried to run for the stairs. I said, wait a minute. Where you going. He said, going outside for a minute, and I

said, wait a minute. Wait a minute, and then Michael said, we got to do something with the

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 67-68]

[Page 67, T, 3/10/87]

or whether he can score higher.

Q. You'd require more testing, more observation?

MR. McCLINTON: Your Honor, the question has been asked and answered. He answered the question to the best of his ability. He's trying to get him to say something that obviously he cannot say at that particular time.

He hasn't done any more testing. There is no more testing to be done. This is a hearing. This is it.

He can't answer the question. He's already said, "I don't know."

THE COURT: Is that what you said?

THE WITNESS: Yes, that's what I said.

THE COURT: Sustain the objection.

Q. (By Mr. Wolock, continuing): You state in your report that "Personality tests reveal a very angry and confused youngster."

What did you mean by that?

A. The tests revealed a youngster who has a lot of inner hostility, and also a youngster whose thinking is quite confused.

Q. You state his reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic.

What does that mean, or what did you mean by that?

[Page 68, T, 3/10/87]

A. That youngsters that score at his level of reality testing just don't see things the way other people do. They tend to be kind of idiosyncratic in their own way. Their thinking is a little bit unusual.

Q. You state, "This is the type of youngster who, once stimulated, would become very intense in the expression of his feelings and have difficulty backing off."

What do you mean by that, sir?

A. To me, that says it very well.

I mean, I don't know what you mean when you say, "What do you mean by that?" It's very plain.

Q. It means what it said?

A. It's very plain, yes.

Q. You say, "There are strong delinquent trends including egocentricity, impulsivity, self-

indulgence, hostility and a strong disregard for rules and authority."

What did you mean by "delinquent trends?"

A. Well, those are the features you see in a delinquent profile. You see the egocentricity, the impulsivity, the self-indulgence, and then the disregard for rules, authority--things like that.

Q. Based on your testing, was there any indication of drug involvement?

A. There's no way to tell from the tests if there's drug involvement.

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 71-72]

[Page 71, T, 3/10/87]

program.

Q. Are you saying that even if he has a learning disability, he has potential for finishing high school as far as a GED?

A. A fifth grade level for reading is high enough to get through high school.

Q. You state there needs to be availability of psychiatric consultation or intervention.

A. Yes.

Q. What did you mean by that?

A. This is a very unstable youngster who may experience crises where he may need some intervention from medical personnel; if not, that maybe the staff where he's at would need some consultation in terms of how to handle situations.

Q. You state in your report, "This young man needs long term incarceration because of the morbidity of his pathology and his instability."

What did you mean by "long term"?

A. I mean that this is a youngster who is quite impaired in terms of both his delinquent trends

and the instability of the personality, and it's not something that you're going to take care of in 10 or 12 months' time.

Q. You state, "The time that he would have in the juvenile system would not be enough time to rehabilitate him to the point where he would be considered, in the opinion of this examiner, as not dangerous to others in the community.

[Page 72, T, 3/10/87]

Why?

A. Because the--what I see in the testing is a youngster who is just very unstable, very disturbed, as well being strongly delinquent. And I don't feel that the length of time in the juvenile system is long enough to guarantee that this youngster would not be dangerous when he is released.

Q. Can he benefit from the programs in the young adult system in the adult system?

A. Yes

Q. Which programs would he benefit from?

A. From the educational program.

Q. As far as the state you find the young man in now, do you have any explanation for what--why he's like that?

I mean, is this just something that happens, you know, at birth? Is something

missing at a young age? Do you have any explanation for what's happening here?

A. I can just speculate like anyone else. But what the testing seem to reveal, it's just a long standing youngster who's been pretty unstable probably most of his life.

Q. If I read Mr. Gregurek's report accurately, there's some school problems but nothing serious enough.

As far as you can tell from the report, he's never come to the attention of the court here, or the court in California, or any other so—called criminal activity.

[Testimony of Thomas Regan, Transcript Of Motion Requesting Waiver Disposition dated March 10, 1987, pp 81-82]

[Page 81, T, 3/10/87]

just to deal with crisis situations that are going to arise with this kind of personality.

Q. Now, how long do you think this type of treatment that you're envisioning might be necessary before the young man might start to turn around?

A. I see a young man who's probably going to have emotional difficulties most of his life. So whatever support he can get would be helpful.

Youngsters or young men like this can make marginal adjustments. They have difficulty holding down jobs and relating to people, because they just are overwhelmed easily. They get upset easily. They get agitated easily.

So as he gets older I think he probably is going to learn to deal with those situations better. And the more support he has, I think the more help that's going to be for him. But--

Q. So you don't think within four years he might be in a situation--if he's given the right vocational training, or given some vocational training, or some psychiatric counseling, some role model counseling, that within a four- year period of

time he might not be able to function in a more appropriate manner?

I am not saying to completely function. It may not be as an average 19, 20 year old who's never been **[Page 82 T, 3/10/87]** incarcerated or that kind of thing. But to be able to function in our society?

A. I feel there would be some improvement. I think any amount of training, structure, or anything like that, is going to improve his chances of succeeding.

Q. Now, you're aware of the fact if he stays in the juvenile system he could remain here until age 19. Is that correct?

A Yes.

Q So that would give the juvenile system four years to work with him. Is that correct?

A Yes.

MR. WOLOCK: Your Honor, I believe the date of birth is 9-5-71. I don't believe that maybe is four years.

MR. McCLINTON: Three years.

MR. WOLOCK: Three and a half years.

MR. McCLINTON: Three and a half years.

Q. (By Mr. McClinton, continuing): Within three and a half years, would there be enough improvement, do you feel, that he could begin to function without the hostility that you envision, or the intense feelings that he has?

A. No, I don't think that's enough time.

Q. How much time do you think would be required, Doctor?

A It's really hard to say specifically how much time.

Q. You don't know if it's 10 years or 20 years or anything like that?

[Testimony of Thomas Regan, Transcript of Motion Requesting Waiver Disposition dated March 10, 1987, p 92]

[Page 92, T, 3/10/87]

of thing?

A. The thing with him is, he can't stop himself. He just gets overwhelmed.

Q. Once they help him to learn to stop that kind of behavior, isn't that part of the group's endeavor?

A. That's part of the group's endeavor, yes.

MR. McCLINTON: Nothing further, Your Honor.

MR. WOLOCK: Any questions, Your Honor?

EXAMINATION

BY THE COURT:

Q. Mr. Regan, what would you say is the diagnosis of this respondent and his problem?

A. At this point I would call it a mixed disturbance of conduct and emotions.

Q. Does that mean his problems are primarily characterological in nature?

A. I see a real mixture with this youngster. I see characterological features along with a lot of other emotional kinds of features.

Q. What would you say your prognosis is?

A Poor.

Q Am I correct in interpreting what you're saying is that he is not treatable in the sense that he's going to be cured; or whatever his problem is, it is a matter of more controlling the behavior rather than changing his profile?

[Findings of Judge Barsamian, Transcript of Motion Requesting Waiver Disposition, dated March 10, 1987, pp143-149]

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others in the community.

I believe on the stand he was even more explicit as far as this young man, that it's not set up for this young man, or its programs, nor does it have time for this young man or his problems, nor is there time sufficiently to help this young man. That even at 15 1/5 he is beyond the assistance of the juvenile system.

We would argue that the other criteria also have been met, and when weighed against the other criteria, as far as amenability to treatment, as far as facilities available, as far as safety of society, unfortunately the grounds for waiver have been made out. That there's a very tragic case. I don't believe the court has much choice, given the testimony that the Court has heard, unfortunately.

THE COURT: Based on the information the Court has before it, the Court makes the following findings relative to the criteria set forth in statute relative to waiver.

In terms of prior record, the Court finds that there is no prior record.

In terms of character of the child, the court adopts the description set forth by Mr. Regan in his report. Specifically, that

personality tests reveal a very angry and confused youngster who would be upset and agitated much of the time. An individual with this profile may have **[Page 144, T, 3/10/87]** difficulty coping with the routine everyday living. They are usually overwhelmed to achieve or accomplish much of anything.

Darrin's reality testing is compromised by his egocentricity and his perception of things would be unique and idiosyncratic This is the type of youngster who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.

Darrin demonstrates some interest in others and has the ability to identify, but his agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Darrin has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. This is the type of youngster who, once stimulated, would become very intense in the expression of his feeling and have difficulty backing off.

There are some strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

In terms of his maturity, he is a person physically and mentally mature. He is operating at the reading grade level of 5.4 and arithmetic level of 5.3.

In terms of his pattern of living, he comes from predominantly a single parent home where the parent is a female.

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His father has chosen to abandon him at a very early age and has had minimal contact with his son. His father certainly does not provide a role model for his son, given his criminal background.

His mother I think probably has tried the best she can under the circumstances to provide for her son. Unfortunately, she has failed to provide him with a positive role model until very recently. It seems that until recently, until her recent marriage, she basically has provided him with basically a female oriented home and/or a home where a male is involved but who is not of a positive role model.

I think that the grandmother has tried to be supportive of her daughter and of her grandson and has tried to intervene whenever it's been necessary for her to intervene, and to provide for her grandchild, probably to the best of her ability.

And I think that the mother herself has had a lot of problems. it seems as though she's been able to work those problems out. She has a drug addiction in her history and she has been committed to the Michigan Department of Corrections for some criminal involvement relative to unarmed robbery.

So this youngster has been exposed to a lot of negative criminal activity in relationship to the people that should be very meaningful to him. And so he has not had very positive role models.

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He has not functioned well in school, and his grades certainly are evident of that.

I think until very recently, hers been able to maintain himself within the community without too much visibility in terms of criminal activity. But it's almost as though it's been festering within him and been building up. And when he ultimately does exhibit the antisocial behavior that's been building up within him, he doesn't mess around with the small stuff; he goes right to the very big time an deprive somebody of their life.

According to the mother and the grandmother, he seems to be a person who has exhibited many of the interests that other children his age would normally show an interest in. So other than this lack of parental responsibility and the shifting between relatives, relative to care, it seems that his life is not any more unusual than many youngsters in our community.

In terms of seriousness of the offense, there's no doubt that murder first degree and felony firearm are extremely serious offenses.

In terms of whether this offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination the child may be beyond rehabilitation under existing juvenile programs and statutory procedures, the Court finds that that criteria is not applicable **[Page 147, T, 3/10/87]** to this case, in that we do have a serious offense here. And secondly, there is no repetitive pattern of offenses.

In terms of relative suitability of programs and facilities available in the juvenile and criminal courts for the respondent, the juvenile justice system has an array of resources available to it. It has the Positive Peer Culture program, the Guided Group Interaction program, which is their predominant treatment modality.

Those are treatment modalities where group intervention is used to promote positive values within those that participate.

Based on the type of profile that has been projected by Mr. Regan and presented to the Court, it would appear that he is not a likely candidate that would benefit from either one of those programs, because these are programs where youngsters are dealing with their peers, where there is confrontation. And based on his profile, he is very likely to respond in a negative fashion and very quickly, and ultimately become disruptive of the program.

In terms of the Intensive Treatment, which is a small program available, and in terms of the juvenile justice system, it would appear

that he is not an appropriate candidate for that program, because apparently that program deals with more vulnerable types of youngsters and not the kind that we have before us.

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In terms of the camps, which would be the other programs provided by the Department of Social Services, it's clear from the testimony of the representative from the Department of Social Services that he would not be a candidate for that program, if in fact he were found guilty of this offense.

And so it would appear that those resources that are available in the juvenile justice system are not the kinds of programs that would be successful with this respondent, given his character and his personality traits.

It would appear that he's more in need of something that is akin to behavior modification, and that is not available in the juvenile justice system. He needs structure, supervision, educational and vocational training, with a milieu of behavior modification. And it would appear that those kinds of resources are available in the adult system.

I think the bottom line is that while the juvenile justice system has many programs, the nature of this youngster, given his personality and his diagnosis, is such that his prognosis, if subjected to those programs, would be very poor. It would seem that his problems are so deep-seated that it is going to take an extensive

period of time to deal with him and his problems to get him to a point where he might continue to operate in our community in an appropriate fashion.

And our system is such that we must release him at age 19. And the evidence by the **[Page 149, T, 3/10/87]** professionals is that he is not likely to be rehabilitated to the point where he would not be dangerous when released at age19. So it would appear that we just do not have the time within which to work, even if he were amenable to the kind of treatment available to him in the juvenile justice system.

And then, finally, whether the best interest of the public welfare and protection of security is such that he should stand trial as an adult. It appears to me that if he is indeed guilty of the offenses of which he is charged, he is a very dangerous individual and needs to be put in a position where the public will not be in danger. And I would think that the priority here should be the safety of the public, and that is the priority of the adult system; and, therefore, it would be more appropriate that he be placed there.

Therefore, the Court feels the criteria for waiver have been met, and the Court will waive him to the Recorder's Court of the City of Detroit for trial as an adult on the offense of murder first degree and felony firearm.

The Court will advise him that he is entitled to appeal the decision of this Court to a

higher court. If he can't afford counsel, counsel will be provided for him, as well as transcripts.
(Whereupon the above-entitled matter was adjourned)

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF WAYNE
JUVENILE DIVISION

in the Matter of: Juvenile Court File No. 258,252

DARRIN HATCHETT Birthdate: September 5, 1971

_____/

OPINION GRANTING WAIVER

In a petition dated December 20, 1986, Darrin Hatchett was charged with Murder, First Degree, and possession of a Firearm in the Commission or Attempt to Commit a Felony. These offenses are alleged to have been committed on December 29, 1986 in the City of Detroit.

Motion for Waiver of Jurisdiction was filed by the Prosecutor. On January 20, 1987, a hearing on the first phase of the Waiver proceeding was held and probable cause was found by the court on the offenses alleged in the petition and motion.

A dispositional hearing was held on March 10, 1987, resulting in the granting of the Motion for Waiver.

It is alleged that the respondent, the complainant and two other youths were in the basement of the home belonging to the family of one of the youths. The complainant and one of the youths were playing pool, when the complainant asked the respondent if he was still mad at him. Respondent told the complainant not to say anything to him and left the house. Respondent returned five minutes later confronting the complainant, saying "talk your junk now," and started shooting. The complainant was shot four times and died. When one of

the other youth began to run, the respondent is alleged to have aimed the gun at him and fired, but the gun only clicked. He ordered the youths not to tell what happened. Respondent went to get someone to help him remove the body, but he refused to help. Respondent then ordered the other youth to help him carry the body to a trash dumpster.

During the dispositional hearing, investigation was conducted by the Court, at which time testimony was taken from Thomas Patrick Regan, Psychologist, Wayne County Clinic for Child Study; Frank Gregurek, Jr., Probation Officer, Wayne County Juvenile Court. Gloria Postell, Delinquency Intake Worker, Department of Social Services; Gary Kasenow, Parole supervisor, Michigan Department of Corrections.

Based on the information garnered during the dispositional phase, the Court found in accordance with the criteria set forth in M.J.C. 712A.4(4) as follows:

Criteria I - The respondent is a 15.6 year old youth, who has no prior record.

His diagnosis is mixed disturbance of conduct and emotions. His problems are deep seated and of long standing. His prognosis for rehabilitation is poor.

Respondent is a very angry and confused person who would be upset and agitated much of the time. Individuals with this profile may have difficulty coping with the routine of everyday living and are usually too overwhelmed to achieve or accomplish much of anything.

Respondent's reality testing is compromised by his egocentricity and his perception of things would be

unique and idiosyncratic. He is the type of person who broods, ruminates and worries. He would appear to be preoccupied and distant much of the time.

The Respondent demonstrates some interest in others and has the ability to identify, but his agitation and instability leads to interpersonal friction. He is overly sensitive to rejection, slight or criticism, and prone to act in an aggressive manner. Respondent has difficulty in delaying his impulses and feelings, and may often get involved without delay and forethought. He is the type of person who, once stimulated, would become very intense in the expression of his feelings and have difficulty backing off. This profile is consistent with the alleged facts of this case.

There are also strong delinquency trends including egocentricity, impulsivity, self-indulgence, hostility and a strong disregard for rules and authority.

Respondent is physically and mentally mature. He operates within the average range of intelligence. His reading grade level is 5.4 and his arithmetic grade level is 5.3.

Respondent's parents were never married, nor aid they ever live together. His natural father is a career criminal, who is currently incarcerated in the Western Wayne County Correctional Facility, and has had minimal contact with the respondent.

His mother was a teenager when she conceived and delivered the respondent, and has been the primary caretaker, except for a couple of times that she has relied on the maternal grandmother to assume that responsibility. The mother is a recovering drug addict who was incarcerated for armed robbery. Since her

release, she has been drug free, married and apparently doing well. She currently resides with her husband, a career soldier, in West Germany. At the time of this incident, respondent resided with his maternal grandmother because he did not want to go to West Germany. Both the mother and maternal grandmother perceive the respondent as being a good boy, who did not present a problem in the home. Respondent has had learning and behavior problems in school. He was suspended from school once while he was a student in California.

Criteria II - The offenses with which respondent is charged are very serious.

Criteria III - This criteria is not applicable since respondent is charged with very serious offenses and there are no prior offenses.

Criteria IV - The respondent is a very disturbed and unstable person with strong delinquency tendencies. He will require a lot of structure, supervision plus academic and vocational training. There is a real question as to whether he is amenable to treatment in either the juvenile or adult criminal system.

The predominant treatment modality available in the Juvenile Justice system is either Positive Peer Culture or Guided Group Interaction, which use group processes to bring about positive social values and behavior. Respondent's personality traits will not enable him to participate in a group process in a meaningful manner. He would evoke negative responses and confrontation from his peers. He would overreact to group interaction and not be able to internalize program goals. Respondent's response to a group rehabilitative process would be such that he would be disruptive in

any treatment program of which he was a part. While the Juvenile Justice system has an excellent academic program, it does not provide any vocational training.

As indicated previously, there is a real question as to the respondent's amenability to treatment. It will take a long time to even begin to penetrate the respondent is a meaningful way. Mr. Regan indicated that it will take four years to see some improvement, and that there is not enough time left in the Juvenile Justice system to complete the treatment process. The Juvenile Justice system has a limited period of time within which to attempt rehabilitation - it must release the respondent at age nineteen. The nature of respondent's difficulties are such as would likely render him dangerous to the public if released at age nineteen.

Respondents profile would not be unusual in the adult system, and it can provide the structure, supervision and time needed. The adult system has no time limit, other than the sentence imposed, and can provide the therapy, educational and vocational programs as needed and appropriate.

Criteria V - If respondent is found guilty of the offenses charged, he is a dangerous person, and the probability that he will repeat his anti-social behavior is very high. He would -represent a great risk to the community. If found guilty of the alleged offenses, it is in the best interest of the public welfare and the protection of public security that the respondent be treated in the adult system.

It is the opinion of the Court, based on the above findings, that Darrin Hatchett meets the criteria set forth in the statute.

/s/

Y.Gladys Barsamian
Judge of Probate
Juvenile Division

YGB:smp
March 27, 1987

(2)

Supreme Court, U.S.
FILED
APR 11 2005
OFFICE OF THE CLERK

No. 04-1134

In the Supreme Court of the United States

LINDA METRISH, WARDEN,

Petitioner,

v.

DARRIN T. HATCHETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Where the Order of the Wayne County Juvenile Court Waiving the Court's Jurisdiction and Transferring the Respondent's Delinquency Prosecution to the Adult Criminal Court Was, Under Michigan Law, a Final Judgment Directly Appealable by Right to the Wayne Circuit Court; and Where Retained Counsel's Failure to Timely Pursue a Direct Appeal of the Waiver Decision Forfeited the Appeal Under Michigan Law Because Legal Challenges to the Waiver Decision Could Not Be First Asserted in the Respondent's Appeal from His Conviction in the Adult Criminal Court; the United States Court of Appeals for the Sixth Circuit Correctly Held, Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), That the Respondent, to Establish Ineffective Assistance of Appellate Counsel Justifying the Issuance of the Writ, Need Not Prove There Was a Substantial Probability He Would Have Prevailed in His Appeal of the Juvenile Court's Order Waiving Jurisdiction, but Need Only Show He Wanted to Appeal, Retained an Attorney to Appeal, and the Attorney Never Filed the Appeal.

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COUNTER-STATEMENT OF THE CASE

Respondent Darrin T. Hatchett (hereinafter "Respondent" or "Mr. Hatchett") was involved in the shooting death of a friend on December 29, 1986, when Respondent was 15 years, 3 months old. The Respondent was a juvenile under Michigan Law at the time of this incident, so the Wayne County Prosecuting Attorney commenced delinquency proceedings against Respondent in the Juvenile Division of the Wayne County Probate Court (hereinafter: "Juvenile Court"). Hearings were held on January 20 and March 10, 1987 to determine whether the Juvenile Court should waive jurisdiction over Mr. Hatchett, and Order this case transferred to the appropriate adult felony court, the Recorder's Court for the City of Detroit (hereinafter: "Recorder's Court"). Following these hearings, the Juvenile Court issued an Opinion and Order waiving its jurisdiction, and transferring this case to the Recorder's Court. (See Petitioner's Appendix, at 78a-83a).

The Petition for Writ of Certiorari (hereinafter: "The Petition") filed by the Michigan Attorney General on behalf of Petitioner Warden Linda Metrish (hereinafter: "Petitioner"), erroneously describes the events which followed the Juvenile Court's waiver of jurisdiction, as follows: "The late Charles Campbell was then appointed to represent Respondent." (Petition, at 4). This is inaccurate. Attorney Charles Campbell was not appointed to represent Mr. Hatchett by any court, but was retained by Mr. Hatchett's family to both represent him on the pending felony charges in the Recorder's Court for the City of Detroit, and to appeal the Juvenile Court's Order Granting Waiver to the Wayne County Circuit Court. The Opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter: "Sixth Circuit") describes these facts correctly as follows:

> Hatchett retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Hatchett at the preliminary examination in state district court, but he did not appeal the juvenile court's decision to waive jurisdiction.... (Petitioner's Appendix, at 3a).
>
> The record in this case does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Hatchett's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in the state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here..." Later, however, he agreed to proceed with the preliminary examination. Because Hatchett's uncle retained counsel to appeal, it is clear that Hatchett would have appealed. (Petitioner's Appendix, at 6a)

The Respondent was then convicted as an adult of two charges following a trial in the Recorder's Court: Second-Degree Murder and Possession of a Firearm During a Felony. He was sentenced to life in prison, plus two years. The Respondent was represented on direct appeal from his Recorder's Court criminal convictions to the Michigan Court of Appeals by a Court-Appointed appellate attorney, Mr. Roman Karwowski, who challenged on appeal the sufficiency of the evidence to sustain the convictions and also argued that the sentence was excessive under Michigan Law (Opinion and Order Denying Habeas Corpus Petition, (hereinafter: "District Court Opinion"), Petitioner's Appendix, at 8a-9a).

Attorney Karwowski did not and could not have raised any challenge to the Juvenile Court Order waiving jurisdiction over Mr. Hatchett to the Recorder's Court in the appeal he filed on behalf of Mr. Hatchett in the Michigan Court of Appeals, because Michigan law required that the Juvenile Court decision to waive jurisdiction must first be appealed directed to the county circuit court, in this case, the Wayne County Circuit Court. The failure of attorney Charles Campbell to file such a direct appeal of the Juvenile Court Order waiving jurisdiction in the Wayne County Circuit Court, which Attorney Campbell had been specifically retained to do, forfeited Mr. Hatchett's legal right to appeal the Juvenile Court Order. Mr. Hatchett's right to appeal and challenge the decision of the Juvenile Court to transfer jurisdiction over this case to the Recorder's Court, a right protected by Michigan Law, was therefore lost as a result of Attorney Campbell's failure to file the appeal that he had been hired to pursue.

Ultimately, Mr. Hatchett initiated further post-conviction proceedings arguing, *inter alia*, that he had been deprived of the effective assistance of appellate counsel by Attorney Campbell's failure to appeal the decision of the Juvenile Court to waive jurisdiction to the Recorder's Court. This claim was properly pursued through the state courts of Michigan, and was then the subject of a Petition for Habeas Corpus filed in the United States District Court, commencing the instant proceedings. (See District Court Opinion, Petitioner's Appendix, at 9a-11a). The District Court denied relief, finding that Mr. Hatchett had failed to establish that, even if Attorney Campbell had filed and pursued an appeal in the Wayne Circuit Court from the Juvenile Court Order waiving jurisdiction over Mr. Hatchett, that there was a "reasonable probability that, but for [Attorney] Campbell's failure to appeal the probate court's decision, the result of the

proceeding would have been different." (District Court Opinion, Petitioner's Appendix, at 23a).

Mr. Hatchett appealed to the Sixth Circuit, arguing that the District Court had applied the wrong legal standard in light of *Roe v Flores-Ortega*, 528 U.S. 470 (2000). The Sixth Circuit agreed, reversed the District Court, and specifically found, based upon *Flores-Ortega, supra*, that "prejudice is presumed from counsel's failure to file a Notice of Appeal when requested by his client." (Sixth Circuit Opinion, Petitioner's Appendix, at 6a)

The Petition filed in this case by the Michigan Attorney General misinforms this Court, and mischaracterizes the appellate remedy provided in Michigan Law for Mr. Hatchett to challenge the Juvenile Court's waiver of jurisdiction. The Attorney General's Petition repeatedly and erroneously refers to such an appeal as an "Interlocutory Appeal." (See Petition, at i, ii, 5, 6, 7, 10, 11, 13). This is completely wrong. The applicable Michigan statutes (Respondent's Appendices, A, B, and C) establish a right of direct review from a Juvenile Court order waiving jurisdiction over a juvenile accused of a serious delinquent act, to the appropriate county circuit court.

This is the only avenue of appellate review provided for such an order. Controlling Michigan cases which both precede and follow the Juvenile Court proceedings in Mr. Hatchett's case have clearly established that any challenge to the waiver of jurisdiction by the Juvenile Court could not be first raised in the Michigan Court of Appeals during Mr. Hatchett's appeal from his convictions in the Recorder's Court, because the failure to first take an appeal of right to the county circuit court forfeits the right to appeal the Order of the Juvenile Court. If such an appeal were an "interlocutory appeal," then there would be no bar to raising

such issues on direct appeal from the convictions in the adult felony court. Thus, it is completely erroneous to refer to an appeal of the Juvenile Court's waiver decision as an "Interlocutory Appeal."

Further, the Petition in this case also mischaracterizes the opinion of the Sixth Circuit (Petitioner's Appendix, at 2a-7a) in this case as representing an unwarranted expansion of *Flores-Ortega*, *supra*. (See Petition, at 7-8, 10, 16). This is an erroneous interpretation of the Sixth Circuit's Opinion. The Sixth Circuit did not expand *Roe v Flores-Ortega*, but simply appropriately and logically applied that decision to the facts of the instant case. This Court in *Flores-Ortega*, *supra,* concluded that a defendant who asserts he was deprived of his right to appeal altogether by the ineffective assistance of appellate counsel need not establish a reasonable probability that he would have prevailed on the appeal; the same reasoning should clearly apply to this case.

Since, under Michigan law, the appeal from a Juvenile Court decision to waive jurisdiction over a juvenile accused of a serious delinquent act to the appropriate adult felony court is not an Interlocutory Appeal, but it is a separate appeal of right which must be pursued or it is forfeited, the reasoning and logic of *Flores-Ortega*, *supra*, should clearly apply. The Sixth Circuit correctly applied the rule established by *Flores-Ortega*, *supra,* to this case, and therefore there is no need for this Court to grant Certiorari and address this case. If this Court should see fit to grant Certiorari, the Judgment of the Sixth Circuit should be affirmed.

REASON'S FOR DENYING THE WRIT

I. Where the Order of the Wayne County Juvenile Court Waiving the Court's Jurisdiction and Transferring the Respondent's Delinquency Prosecution to the Adult Criminal Court Was, Under Michigan Law, a Final Judgment Directly Appealable by Right to the Wayne Circuit Court; and Where Retained Counsel's Failure to Timely Pursue a Direct Appeal of the Waiver Decision Forfeited the Appeal Under Michigan Law Because Legal Challenges to the Waiver Decision Could Not Be First Asserted in the Respondent's Appeal from His Conviction in the Adult Criminal Court; the United States Court of Appeals for the Sixth Circuit Correctly Held, Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), That the Respondent, to Establish Ineffective Assistance of Appellate Counsel Justifying the Issuance of the Writ, Need Not Prove There Was a Substantial Probability He Would Have Prevailed in His Appeal of the Juvenile Court's Order Waiving Jurisdiction, but Need Only Show He Wanted to Appeal, Retained an Attorney to Appeal, and the Attorney Never Filed the Appeal.

A. An Appeal from a Michigan Juvenile Court Order waiving jurisdiction over a juvenile is not an "Interlocutory Appeal."

1. In Michigan, a Juvenile has an appeal of right from a Juvenile Court Order waiving jurisdiction.

The Petition for Writ of Certiorari filed in this case repeatedly and erroneously mischaracterizes the appellate procedures provided in Michigan to juveniles who wish to

challenge on appeal a decision by the Juvenile Court to waive jurisdiction over them to the appropriate adult felony court. Under Michigan law, an Order of a Juvenile Court waiving jurisdiction over a juvenile charged with a serious delinquent act to the appropriate adult felony court is a final Order of that Court, appealable by right to the circuit court for the county where the Juvenile Court sits. If the appeal of right is not pursued in a timely manner, the right to raise a legal challenge to the waiver decision of the Juvenile Court is forfeited and lost forever. This procedure does not fit the definition of an: "Interlocutory Appeal." The phrase "Interlocutory Appeal" is used to refer to appeals taken prior to the final judgment of the case, where the appellant requests a higher court to exercise its discretion, and review an interlocutory order, based upon a belief that the progress of the litigation will be expedited or advanced if a particular issue or issues are decided before trial.

Pursuant to Michigan statutes which were in effect at the time of Mr. Hatchett's case, and which are still in effect today, an appeal of a Juvenile Court Order waiving jurisdiction is *not* an Interlocutory Appeal; it is an appeal from a final judgment issued by the Juvenile Division of the county Probate Court. The time limitations and other requirements for appealing from a final judgment must be met, or the juvenile's legal right to appeal the Juvenile Court's decision to waive jurisdiction is forfeited.

The mischaracterization of this procedure in the Petition is particularly unfortunate and troubling, since the Opinion of the District Court in this matter accurately describes Michigan Law on this very point, as follows:

> A juvenile was entitled to an appeal of right in circuit court from the probate court's waiver of jurisdiction.

> *People v Jackson*, 171 Mich App 191, 195-96; 429 N.W. 2d 849, 852 (1988). After the deadline for filing a claim of right expired, he could apply for leave to appeal in the circuit court. *Id.*, 171 Mich App at 196; 429 N.W. 2d at 852. *Failure to appeal the juvenile court's decision to waive jurisdiction barred review of the issue in the Michigan Court of Appeals. Id.*; *People v Mahone*, 75 Mich. App. 407, 410; 254 N.W. 2d 907, 909 (1977). (District Court Opinion, Petitioner's Appendix, at 23a)(emphasis supplied).

The District Court clearly and correctly understood that Attorney Campbell, who was retained to represent Mr. Hatchett after the Juvenile Court waived jurisdiction over him to the Detroit Recorder's Court, forfeited Mr. Hatchett's ability to challenge the decision of the Juvenile Court by not timely pursuing an appeal to the Wayne Circuit Court from the Juvenile Court Order waiving jurisdiction. The District Court went on to point out:

> Attorney Charles Campbell did not appeal the juvenile court's waiver of jurisdiction, and his failure to do so precluded Petitioner from raising the issue in the Michigan Court of Appeals. *Jackson*, 171 Mich. App. at 195; 429 N.W. 2d at 852. Petitioner alleges that Campbell squandered his best chance at avoiding exposure to a life sentence. [footnote omitted] (District Court Opinion, Petitioner's Appendix, at 16a).

The District Court Opinion also describes the facts in the record supporting Mr. Hatchett's contention that attorney Campbell was in fact hired to appeal the final judgment of the Juvenile Court waiving jurisdiction over Mr. Hatchett, as follows:

> The record does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Petitioner's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in state district court, stating that this was a waiver from juvenile court and "[W]e have to study all of that and consider our options there and here..." (Tr. Mar. 23, 1987, at 3). Later, however, he agreed to proceed with the preliminary examination. (District Court Opinion, Petitioner's Appendix, at 16a).

Thus, the Petitioner, by mischaracterizing the procedures in Michigan governing an appeal from a Juvenile Court Order waiveing jurisdiction over a juvenile accused of delinquent acts, inappropriately minimizes the legal effect of the deficient performance of attorney Campbell in failing to file and pursue such an appeal.

2. <u>The Attorney appointed to represent the Respondent after his conviction in the adult criminal court could not have challenged the Juvenile Court Order waiving jurisdiction.</u>

The Petitioner further misleads this court by inaccurately stating that after Mr. Hatchett was convicted and sentenced in the adult felony court, the attorney who represented him on appeal from his convictions in the Recorder's Court could have, in that appeal, challenged the decision of the Juvenile Court to waive jurisdiction. The Petition erroneously states:

> Furthermore, Respondent was afforded new counsel on appeal from his conviction, who was able to review the record to determine if there was an issue of

ineffective assistance of counsel that caused his client actual prejudice. (Petition, at 8).

This statement is completely wrong, for several reasons. First, Mr. Karwowski, the attorney assigned to represent Mr. Hatchett after his conviction in the Recorder's Court, would not have been able to challenge the order of the Juvenile Court to waive jurisdiction over Mr. Hatchett because, as pointed out by the Opinion of the District Court in the excerpts quoted, supra, Michigan law establishes that the failure to pursue a direct appeal of the Juvenile Court decision to the county circuit court "precludes the defendant from raising the issue again in the Michigan Court of Appeals." (District Court Opinion, Petitioner's Appendix, at 16a).

In addition, the appellate attorney representing Mr. Hatchett following his convictions in the Detroit Recorder's Court, was appointed by the Detroit Recorder's Court; s/ he would not have been able to obtain copies of the records and transcripts of the proceedings in the Juvenile Court at Court expense. In Michigan, in the vast majority of cases, the Court whose Judgment is being challenged is the Court that appoints counsel for an indigent defendant. Individual courts jealously guard the prerogative to appoint counsel.

Had attorney Campbell properly filed an appeal from the Juvenile court's decision to waive jurisdiction, the appeal would have gone to the Wayne County Circuit Court, and been heard in a separate court by a separate Judge from the Judge assigned to preside over the adult criminal prosecution in the Detroit Recorder's Court. Further, attorney Campbell, as retained counsel, would have had to pay the necessary costs to the Juvenile Court Reporter and to the Juvenile Court Clerk to obtain copies of the transcripts and the records.

Had the Wayne County Juvenile Court assigned counsel to represent Mr. Hatchett on appeal from its decision to waive jurisdiction, the Juvenile Court would have provided its own Court-assigned attorney with copies of the transcripts and court records at court expense. However, Attorney Roman Karwoski, the attorney who was assigned by the Detroit Recorder's Court to represent Mr. Hatchett on appeal after his trial in the adult felony court (Sixth Circuit Opinion, Petitioner's Appendix, at 3a), would not have been provided transcripts and records from the Juvenile Court at Court expense, because he was not appointed by that Court.

Further, by the time Mr. Karwowski was assigned to represent Mr. Hatchett on appeal from his convictions in the Detroit Recorder's Court, the time limit for filing an appeal of right from the Juvenile Court waiver decision had long expired. This is made clear both by the District Court's Opinion, supra, and by the applicable Michigan statutes which provide for appeals from decisions of the County Probate Court. MCL 600.861; MSA 27A.861 (attached as Appendix A), provides that certain decisions of the Michigan Probate Courts can be appealed directly to the Michigan Court of Appeals. Importantly, a decision of the Juvenile Division of the Probate Court to waive jurisdiction over a juvenile accused of delinquent acts is *not* among the decisions that can be appealed directly to the Michigan Court of appeals. MCL 600.863; MSA 27A.863 (attached as Appendix B), provides that:

> "a person aggrieved by an order, sentence, or judgment of the probate court other than an order appealable under section 861 (MCL 600.861; MSA 27A.861, *supra*), may appeal to the circuit court in the county in which the order, sentence or judgment is rendered."

Such an appeal is on the Juvenile Court record, and is not *de novo*. MCL 600.866; MSA 27A.866 (attached as Appendix C).

Thus, appeals of Orders of the Juvenile Court waiving jurisdiction over juveniles accused of delinquent acts must go to the county circuit court for the county where the probate court was sitting. At the time Respondent's case was heard, the adult felony court which acquired jurisdiction over Mr. Hatchett following the waiver of jurisdiction by the Juvenile Division was the Detroit Recorder's Court. This is a separate Court, with different Judges, who would not have had jurisdiction to entertain the appeal from the Juvenile Court's waiver of jurisdiction; such an appeal had to be filed in the Wayne Circuit Court.

3. The failure of the attorney retained to directly appeal the Juvenile Court Order waiving jurisdiction over Respondent forfeited the issues which could have been raised in that appeal.

The cases cited by the District Court, *supra*, clearly establish that an appeal of the Juvenile Division's decision to waive jurisdiction *must* be taken directly to the County Circuit Court, or the appeal is forfeited. In *Mahone*, *supra*, the Michigan Court of Appeals discusses the predecessor statutes to the statutes which were in effect in 1986 and 1987, when Mr. Hatchett's case was before the Juvenile Court.

The more recent statutes are attached in the Respondent's Appendix, infra. However, the substance of these statues did not change. The Michigan Court of Appeals, in *Mahone*, supra., described the effect of those statues on the right to

appeal a Juvenile Court decision to waive jurisdiction in a juvenile delinquency case, as follows:

> Based on our reading of the above statutes, as well as the cited court rules, we hold that where, as here, a probate court waives jurisdiction over a juvenile in order that he be tried as an adult, the juvenile must first seek review of that decision in the circuit court before this Court will consider the question. Defendant advances no suitable reason why he should be allowed to circumvent the statutory scheme; he cites no cases where this Court exercised review on similar facts. *Cf., People v Bowers*, 54 Mich App 565, 566; 221 NW2d 472 (1974). Hence we refuse to engraft on the foregoing statues a judicial exception which would sap them of their force. [footnote omitted].
>
> Review by the circuit court, we believe, serves three salutary functions: (1) it permits consideration by a court in the same locale as the juvenile court, presumably a court more intimately familiar than are we with the available regional facilities for rehabilitation of juveniles, see MCL 712A.4(4)(d); MSA 27.3178(598.4)(4)(d) and JCR 1969, 11.1(B)(4); (2) it bears the potential that an erroneous waiver decision will be more speedily considered and reversed than is possible in this Court (thus ensuring that a minor over whom jurisdiction is mistakenly waived, will be returned quickly to juvenile rehabilitation); and (3) it provides the Court of Appeals with an analysis, independently undertaken, of the probate court's reasons for waiver. With these functions in mind, we conclude that defendant may not subvert the legislative plan.[1]

> 'We note, however, that a defendant who *does* invoke circuit-court review of a waiver order may, upon his later conviction, raise anew the propriety of waiver in his appeal of right before this Court. *See People v Schumacher*, 75 Mich App 505; 256 NW2d 39 (1977).... *Mahone*, *supra*, at 410-411. (emphasis added)

Mahone, is particularly important because it was decided in 1977, and is the applicable precedent that controlled at the time Mr. Hatchett's case was before the Juvenile Court. Further, as pointed out by the District Court, *supra*, the Michigan Court of Appeals reaffirmed *Mahone* in 1988 in *People v Jackson*, *supra*., an opinion which was handed down by the Michigan Court of Appeals approximately 1 and ½ years after the Juvenile Court waived jurisdiction over Mr. Hatchett. *Jackson* , *supra*, at 195-196, clearly states:

> This Court will not rule on the propriety of a waiver of jurisdiction by the probate court unless the juvenile first seeks review in the circuit court. The review procedure is governed by the statutes and court rules pertaining to appeals. *People v Mahone*, 75 Mich App 407, 410; 254 NW2d 907 (1977).
>
> GCR 1963, 701.2(a), now MCR 7.101(B)(1), provided for an appeal as of right to the circuit court from a probate court order if appeal was taken within twenty days of the entry date of the order (twenty-one days under the new rule). Where the twenty-day period had expired, the circuit court could grant leave to appeal if requested pursuant to GCR 1963, 701.2(c), 703.2, now MCR 7.101(B)(2), 7.103(B).

> Here, defendant appealed from the probate court's August 20, 1984, order waiving jurisdiction within the twenty-day time limitation of former GCR 1963, 701.2(a). However, defendant subsequently abandoned the appeal, which has been dismissed. Moreover, defendant never sought leave to appeal in the circuit court. Because no appeal has been pursued in the circuit court, this Court may not consider the propriety of the probate court's order waiving jurisdiction. [footnote omitted]

These principles are well settled in Michigan Law. Thus, in *People v Figlus*, 86 Mich App 552; 272 NW2d 722 (1978), the Michigan Court of Appeals refused to hear an appeal from a juvenile who was convicted in the adult felony court following a waiver of the Juvenile Court's jurisdiction, because of the failure of the defendant to take a direct appeal from the juvenile court decision. The Court stated: "no appeal from the probate court's decision to waive jurisdiction was taken in the Circuit Court [citations omitted]." Thus, the Michigan Court of Appeals refused to review the propriety of the Juvenile Court's decision to waive jurisdiction.

In another case, entitled: *In the Matter of Arthur C. Evans*, 99 Mich App 466; 297 NW2d 873 (1980), the Michigan Court of Appeals *did* review the propriety of the Juvenile Court's decision to waive jurisdiction over a juvenile accused of acts of delinquency, where the juvenile *did* timely challenge the waiver decision in the Wayne County Circuit Court, and where the Circuit Court in fact reversed the Judgment of the Juvenile Court. Upon consideration of the merits, the Michigan Court of Appeals reversed the Circuit Court's decision, and reinstated the Juvenile Court's decision to waive jurisdiction. [Note: undersigned counsel represented

juvenile, Arthur C. Evans, in the above case during the waiver of jurisdiction proceedings in the Juvenile Court.]

In *People v Billington*, 116 Mich App. 220; 323 NW2d 343 (1982), the Michigan Court of Appeals noted that the 1979 statutory changes did not alter the law in Michigan that a decision of the Juvenile Court to waive jurisdiction over a juvenile charged with delinquent acts is a final judgment which must be appealed directly to the county circuit court. *Billington*, *supra*, at 229-230, states as follows:

> There is no showing on the record that defendant's prior juvenile convictions were constitutionally infirm. Defendant admits that the waiver was not initially challenged in the circuit court on the present grounds. In *People v Mahone*, 75 Mich App 407; 254 NW2d 907 (1977), the Court held that where a probate court waives jurisdiction over a juvenile to try him as an adult, the juvenile must first seek review of that decision in the circuit court before this Court will consider the question. In *People v Figlus*, 86 Mich App 552; 272 NW2d 722 (1978), and in *Mahone*, this Court held that where the defendant did not invoke the circuit court's review of the probate court's decision to waive jurisdiction, defendant waived any challenge he might have had to the infirmity of the probate court proceedings.
>
> The above-cited cases in which the defendants were found to have waived any challenge to the infirmity of the probate court proceedings were all based upon MCL 712A.22, 701.45a; MSA 27.3178(598.22), 27.3178(45.1). These statutes have now been superseded by the Revised Judicature Act, specifically by MCL 600.863; MSA 27A.863, which states that a

> person aggrieved by a final order, sentence or judgment of a probate court may appeal from that order to the circuit court; appeal to this Court in a case of this type is by application and not as a matter of right. Leave to appeal not having been granted, this issue is not properly before this Court.

Finally, the seminal decision in Michigan setting forth, discussing, and applying the criteria which must be looked at to determine whether Juvenile Court jurisdiction is properly waived is *People v Jeffrey Dunbar*, 423 Mich 380; 377 N.W.2d 262 (1985), which opinion was handed down approximately two years before the Juvenile Court proceedings in Mr. Hatchett's case. [NOTE: undersigned counsel represented juvenile Jeffrey Dunbar during the waiver of jurisdiction proceedings in the Juvenile Court]. The *Jeffrey Dunbar* opinion summarized the appellate progress of that case, explaining how the appeal of the Juvenile Court decision to waive jurisdiction came before the Michigan Supreme Court. The Court stated as follows:

> Jurisdiction was waived in September, 1978, and defendant promptly appealed this determination. The circuit court did not decide the appeal until July, 1979, several months after defendant was tried and sentenced. The Court of Appeals affirmed the waiver order and the conviction two years later. *Jeffrey Dunbar*, *supra*, 423 Mich at 398, n. 8.

Thus, defendant Dunbar properly appealed the final judgment of the Juvenile Court to the Wayne Circuit Court, which ultimately affirmed the decision of the Juvenile Court to waive jurisdiction, although the circuit court did not issue its opinion until after defendant Dunbar had gone to trial in the Detroit Recorder's Court and been convicted of First

Degree Felony Murder. Both the Juvenile Court's Order waiving jurisdiction, and the murder conviction in the adult court, were appealed to the Michigan Court of Appeals, which rejected all claims for relief. The Michigan Supreme Court then granted leave to appeal, and ultimately issued its seminal opinion in Juvenile Law, and determined that the Juvenile Court had improperly waived its jurisdiction over Mr. Dunbar, and ordered his adult felony conviction vacated.

Similarly, in the instant case, the Order of the Juvenile Court waiving its jurisdiction over Respondent Darrin Hatchett was a final Order, which, under Michigan law, Mr. Hatchett had a right to appeal. Mr. Hatchett attempted to exercise his right of appeal. His family retained attorney Charles Campbell to both represent him on the pending charges in the Detroit Recorder's Court, and to appeal the decision of the Juvenile Court waiving jurisdiction over him.

However, as found by the District Court, Attorney Campbell never filed an appeal from the Juvenile Court Order in the Wayne Circuit Court. (District Court Opinion, Petitioner's Appendix, at 16a). Thus, it is not correct to say, as contended by Petitioner, that Attorney Roman Karwowski, who was assigned to represent Mr. Hatchet following his trial conviction in the Detroit Recorder's Court, could have challenged the Order of the Juvenile Court to waive jurisdiction. (Petition, at 10-11, 13). The time limits for an appeal of right from the Order of the Juvenile Court had expired by that time. Even if Attorney Karwowski had raised a challenge to the Juvenile Court's Order waiving jurisdiction in the Michigan Court of Appeals, the Michigan Court of Appeals would have refused to consider it, in light of Mr. Hatchett's failure to first take an appeal of right to the Wayne County Circuit Court. *Mahone*, *supra*, *Figlus, supra*, and *Jackson*, *supra*. Further, the Juvenile Court Order was not

issued by the Detroit Recorder's Court, which is the court which had appointed Mr. Karwowski to represent Mr. Hatchett; therefore an appeal of the Juvenile Court Order was outside the scope of the Order appointing Mr. Karwowski to represent Mr. Hatchett. In addition, since Mr. Karwowski had not been appointed by the Juvenile Court, the Juvenile Court would not have recognized his assignment as counsel for Mr. Hatchett, and would have refused to provide Mr. Karwowski with copies of the transcripts of the Juvenile Court hearings, or copies of documents in the Juvenile Court file, at court expense. Without access to the transcripts or records of the proceedings in the Juvenile Court, Mr. Karwowski, assigned by the Detroit Recorder's Court, would have been completely unable to mount any substantive challenge to the Juvenile Court's Order waiving jurisdiction over Mr. Hatchett.

B. <u>The policies underlying *Roe v Flores-Ortega*, 528 U.S. 470 (2000) fully apply to this case, and logically lead to the same result.</u>

The Petitioner erroneously presents this as a case of first impression. It is not, because, as determined by the Sixth Circuit, this case presents un uncontroversial and eminently logical application of the rule in *Flores-Ortega*, *supra*, to the final judgment of the Juvenile Court waiving jurisdiction over the Respondent. The Juvenile Court issued this Order following a contested hearing, involving the presentation of evidence, and arguments by counsel.

The complexity of the issues and arguments that can be appropriately raised in appeal from such a Juvenile Court Order is illustrated by the seminal opinion of the Michigan Supreme Court in *People v Jeffrey Dunbar*, 423 Mich 380, 385-86; 377 NW2d 262 (1985), which was the leading case in

Michigan concerning the waiver of juvenile court jurisdiction at the time of the Juvenile Court hearings in the instant case. In *Dunbar*, *supra*, the Michigan Supreme Court discussed at length the record of the testimony presented at the hearing before the Juvenile Court, and applied the legal standards which govern the decision to waive jurisdiction as established by Michigan law, to the facts as presented. The Opinion of the Michigan Supreme Court in *Dunbar* takes up 15 pages of the Michigan reporter. *Dunbar*, *supra.*, 423 Mich at 383-398. The dissenting opinion takes up 12 pages of the Michigan reporter. *Dunbar*, *supra*, 423 Mich at 398-410 (Dissenting Opinion of Boyle, J.). Thus, the issues which can be raised in such an appeal are many, and complex.

For these reasons, the policies underlying this Court's decision in *Roe v Flores-Ortega*, *supra*, fully apply to the instant case. In *Flores-Ortega*, *supra*, this Court clearly rejected any suggestion that a Habeas Petitioner, such as Mr. Hatchett, who has been deprived of his right to appeal by the ineffective assistance of appellate counsel, must articulate the arguments that would have been raised in such an appeal, had it been taken, or demonstrate a likelihood that the appeal would have probably been successful had it been properly and timely pursued. In *Roe v Flores-Ortega*, *supra*, this Court stated:

> Similarly, in *Rodriquez* [*v. United States*, 395 U.S. 327 (1969)], counsel failed to file a notice of appeal, despite being instructed by the defendant to do so. See *Rodriquez*, 395 U.S., at 328. We held that the defendant, by instructing counsel to perfect an appeal, objectively indicated his intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other

> appellan[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated." *Id.*, at 330. See also *Evitts v Lucey*, 469 U.S. 387 (1985) (defendant entitled to new appeal when counsel's deficient failure to comply with mechanistic local court rules led to dismissal of first appeal).....

For these reasons, this Court reached the following conclusion in *Roe v Flores- Ortega*, *supra*:

> By the same token, although showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," *Rodgriquez*, 395 U.S., at 330, will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed. See *ibid.*; see also *Peguero* [*v. United States*], 526 U.S. [23], at 30 [1999] (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion"). We similarly conclude here that it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed.

Mr. Hatchet has met the test set forth by this Court in *Roe v Flores-Ortega*, *supra*. The Opinion of the District Court clearly found that Mr. Hatchett has established that he wanted to appeal, and that in fact Attorney Charles Campbell was hired to pursue the appeal. (District Court Opinion, Petitioner's Appendix, at 8a-9a, 12a, 16a, 23a-24a). This aspect of the District Court's Opinion was upheld by the Sixth Circuit (Opinion of the Sixth Circuit, Petitioner's Appendix, at 3a, 5a, 6a-7a).

For these reasons, the Petitioner's argument that the Sixth Circuit erroneously applied the "presumed prejudice" standard of *Roe v Flores-Ortega*, *supra*, to this case, is off base. The Petitioner argues: "Here a record exists from which actual prejudice can be ascertained from that failure [to appeal the Juvenile Court's Order waiving jurisdiction]. (Petition, at 10). Contrary to this assertion, the issue presented in this case is no different from the issue presented to this Court in *Roe v Flores-Ortega*, where the Petitioner had lost his right to appeal his adult felony conviction because his attorney failed to file and pursue the appeal.

It is true that in the instant case, just as in *Flores-Ortega*, there are transcripts and court records available from which Mr. Hatchett could have attempted to, on his own, identify and articulate possible appeal issues which could have been raised in an appeal of right from the Juvenile Court decision waiving jurisdiction. However, in *Flores-Ortega*, this court decided as a matter of policy that a Habeas Petitioner should not be put into the position of trying to articulate the appellate issues, and establish that these issues would probably have resulted in a different outcome of the proceeding; this Court reached this decision based upon a recognition that the essence of the violation of the Petitioner's rights was the deprivation of a procedure, an appeal; an appeal which he

had a right to, but which he was deprived of altogether. Just as the Habeas Petitioner in *Flores-Ortega*, *supra*, had a right to have an appeal from the final judgement convicting him of certain crimes, so too did Mr. Hatchett have a right to appeal the final judgment of the Juvenile Court waiving jurisdiction over him to the adult court, where he would confront the full weight of substantially more severe penalties.

The Petitioner also implies that Mr. Hatchett does not have any meritorious grounds to present on appeal from the Order of the Juvenile Court waiving jurisdiction, by incorrectly asserting that Mr. Hatchett does not contest anything that transpired at either of the two hearings held in the Juvenile Court on January 20 and March 10, 1987, that resulted in the Juvenile Court Order waiving jurisdiction. (See Petition, at 3-4). To the contrary, Mr. Hatchett has numerous objections to the proceedings that took place in the Juvenile Court, but has not raised them in the course of these proceedings because he is not required establish that he has issues which will probably result in a different outcome. *Flores-Ortega*, *supra*. To show prejudice, all Mr. Hatchett must establish is that he was deprived of his right to appeal by the deficient performance of his counsel. The prejudice Mr. Hatchett must show, and has shown, is that he has been deprived of his right of appeal the Juvenile Court Order waiving jurisdiction to the Detroit Recorder's Court. Mr. Hatchett need not, at this stage of the proceedings, prove meritorious grounds for the appeal that could have been asserted had the appeal been taken in a timely fashion.

The Petitioner cites two cases as standing for the proposition that, to establish the prejudice prong of the ineffective assistance of counsel standard established by *Strickland v Washington*, 466 U.S. 668 (1984), where an appellate attorney fails to pursue an appeal from a Juvenile

Court Order waiving jurisdiction over a juvenile to an adult criminal court, a Petitioner must establish a reasonable probability that the appeal would have been successful. *Spytma v Howes*, 313 F3d 363, 372 (6th Cir. 2002); *Foster v Johnston*, 293 F3d 766, 789 (5th Cir. 2002)(See Petition at 12). However, for whatever reason, neither of these cases discusses, or even mentions the application of *Flores-Ortega*, *supra*, to the issue before it. Thus, neither case provides any insight as to why the court felt the issue presented for decision was not controlled by *Flores-Ortega*, *supra*. Therefore, neither of these cases establishes a rule of law which distinguishes the facts of those cases from the facts and holding of *Flores-Ortega*, *supra*. For the reasons stated, *Flores-Ortega* clearly applies here, and mandates affirmance of the Opinion of the Sixth Circuit.

C. <u>The Order of the Juvenile Court waiving jurisdiction over Mr. Hatchett to the Detroit Recorder's Court is not analogous to an Order issued by a trial court following an evidentiary hearing on a defense motion to suppress certain evidence.</u>

The Petitioner is also off base in trying to analogize the decision of the Juvenile Court to waive jurisdiction over Mr. Hatchett to the Detroit Recorder's Court to an Order following pretrial hearing by the trial court on a defense motion to suppress certain evidence. (Petition, at 10-13). The failure to take interlocutory review of pretrial decisions of the trial court regarding the suppression of evidence does not limit the ability of a convicted defendant to raise those same arguments on direct appeal from a trial court conviction. However, in this case, Attorney Campbell's failure to directly appeal to the Wayne Circuit Court the Juvenile Court Order waiving jurisdiction over Mr. Hatchett to the

Detroit Recorder's Court effectively deprived Mr. Hatchett of his right to appeal.

CONCLUSION

The Sixth Circuit correctly applied this Court's ruling in *Roe v Flores-Ortega*, *supra.*, to the instant case, and correctly determined that Respondent Hatchet did not need to prove that his appeal from the Final Judgment of the Juvenile Court waiving jurisdiction over him to the Recorder's Court for the City of Detroit would have probably been successful; he need only demonstrate that he intended to appeal, that he retained an attorney to perfect his appeal from the Juvenile Court Order, and that the attorney never filed the appeal.

RELIEF REQUESTED

Therefore, for all the above reasons, the Petition filed by the Michigan Attorney General for a Writ of Certiorari should be denied; or, in any event, the Judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Dated: April 11, 2005

APPENDIX A

CHAPTER 600 REVISED JUDICATURE ACT OF 1961
REVISED JUDICATURE ACT OF 1961
CHAPTER 8. PROBATE COURTS
MCL § 600.861

§ 600.861; MSA 27A.861. Appeals to court of appeals

Sec. 861. A party to a proceeding in the probate court may appeal the following orders as a matter of right to the court of appeals:

(a) A final order affecting the rights or interests of any interested person in an estate or trust.

(b) An order entered in an adoption proceeding under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, and appealed in accordance with section 65 of chapter X of Act No. 288 of the Public Acts of 1939, being section 710.65 of the Michigan Compiled Laws.

(c) The following final orders entered by the juvenile division of the probate court:

(i) An order of disposition placing a child under the supervision of the court or removing the child from his or her home.

(ii) An order terminating parental rights.

(d) A final order in a condemnation case entered under the drain code of 1956, Act No. 40 of the Public Acts of 1956, being sections 280.1 to 280.630 of the Michigan Compiled Laws.

Amended by P.A. 1982, No. 318, § 1, Imd. Eff. Oct. 18, 1982.

APPENDIX B

MCL § 600.863

§ 600.863; MSA 27A.863 Appeals to circuit court

Sec. 863. (1) Except when prohibited by statute, a person aggrieved by an order, sentence, or judgment of the probate court, other than an order appealable under section 861, may appeal from that order, sentence, or judgment to the circuit court in the county in which the order, sentence, or judgment is rendered. An interlocutory appeal under this subsection shall be by application and not as a matter of right.

(2) An appeal to the court of appeals from a judgment entered by the circuit court on an appeal from the probate court under subsection (1) shall be by application.

(3) Instead of appeal under subsection (1), a party may appeal directly to the court of appeals upon certification of the issue or issues by the probate judge. An appeal under this subsection shall be by application and not as a matter of right.

APPENDIX C

MCL § 600.866

§ 600.866; MSA 27A.866. Appeal on record

Sec. 866. (1) All appeals from the probate court shall be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. An appeal shall not be tried de novo.

(2) Notice of appeal shall be given to all interested parties as provided by supreme court rule.

(3) Except as otherwise provided in sections 861 to 867, appeals from the probate court or a judge thereof shall be governed by supreme court rule.